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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 410 - 411

SIDNEY J. DILLON and LEWIS S. CROWLEY,
Petitioners,

vs.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR WRIT OF CERTIORARI
to the United States Circuit Court of Appeals
for the Eighth Circuit.

EDWARD L. O'CONNOR,
FRANK J. CONNOR,
WALKER F. MAHAN,
Attorneys for Petitioners.

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IN THE

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UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR WRIT OF CERTIORARI
to the United States Circuit Court of Appeals
for the Eighth Circuit.

To the Honorable Charles Evans Hughes, Chief Justice of the United States, and to the Associate Justices of the Supreme Court of the United States:

Petitioners respectfully pray for a writ of certiorari to review the final judgment of the Circuit Court of Appeals for the Eighth Circuit entered on the 5th day of August, 1940, affirming the judgment of conviction against petitioners on a plea of *nolle contendere* by the United States District Court in and for the Southern District of Iowa, Central Division.

The petitioners were jointly indicted on twelve counts on or about the 13th day of April, 1939. (Tr. 1-18.) They

first entered a plea of Not Guilty to all counts (Tr. 21), but later, by agreement of counsel, and with the consent of the trial judge, petitioners withdrew their plea of Not Guilty and entered a plea of *Nolle Contendere* (September 15th and 29th) to Counts I and XII (Tr. 21-22), and the cause was submitted on, and the prosecution confined to, these two counts.

On September 29th, 1939, the trial judge entered an order that the cause as to each petitioner was to be passed for sentence until Monday, November 27th, 1939.

Count I it is said purported to charge a violation of Section 338 of T. 18 of the U. S. C. Among other things, the indictment stated (Tr. 2):

> "That * * * Sidney J. Dillon and Lewis E. Crowley, * * * 'defendants', * * * having devised and intended to devise a scheme and artifice to defraud and to obtain money and property by means of false and fraudulent pretenses, * * * from sundry persons, * * * hereinafter called investors, including all persons who could or might be induced by means of said * * * representations and promises, hereinafter mentioned, to become purchasers of shares in investment trusts operated and controlled by the defendants, to-wit: American Securities Trust, Mutual Trust Shares, and Cooperative Trust Shares;"

This Court will note that the purported offense is the sale of shares in three companies, American Securities Trust, Mutual Trust Shares, and Cooperative Trust Shares. The alleged crime is not the sale of shares in one company, *but shares of three companies.* This is an express allegation in the indictment (Tr. 5). The indictment uses the word "trusts", not "trust". The indictment then charges in substance that the petitioners under their own names and under the names of American Securities Trust, Mutual Trust Shares, Cooperative Trust Shares, National Securities Corporation, and Mid West Discount Corporation, did by means

of correspondence and circular letters cause to be made false representations.

While the indictment recites "corespondence and circular letters" were used, it does not allege same were sent through the mails.

Count I sets forth seven separate and distinct alleged misrepresentations. (Tr. 2-5.) *To whom such representations were made, how they were made, and when they were made, does not appear in the indictment,* as no letter or writing is set forth containing any representation of any kind or character.

National Securities Corporation, mentioned in the indictment as one of the instrumentalities through which alleged misrepresentations were made, was the selling organization and brokerage company which, for a long period of time, handled the sale of shares of American Securities Trust, Mutual Trust Shares, and Cooperative Trust Shares.

National Securities Corporation had paid substantially all of the operating expenses of each one of these companies for a period of years. (Tr. 77-80.) The Trusts had loaned money to National Securities Corporation to cover these expenses and had taken its promissory notes therefor. This, the Government designated a "diversion" of funds, and petitioners were convicted because of these so-called "diversions", rather than because of a violation of Section 338 of T. 18. (Tr. 236-242.)

Mid West Discount Corporation did not have anything to do with the sale of shares, but did finance the purchase contracts when the shares were sold on a time payment basis, thus insuring that the trusts received cash for their shares.

Since the devising or intending to devise a scheme to defraud is not a crime under Section 338 of T. 18 unless the United States mails are used in execution or attempted execution thereof, attention is called to the fact that only

one letter or writing was set forth in Count I with respect to the three Trusts. It is a letter signed in type by Cooperative Trust Shares, and reading as follows:

"April 22, 1936.

Dear Mrs. Heefner:

We beg to enclose herewith the following securities, receipt of which please acknowledge on enclosed blank.

766 shares Certificate No. 458 $1.14 $873.24

Very truly yours,

EB Cooperative Trust Shares."

There is no specific charge in either count of the indictment, nor is there any evidence of any kind or character showing or charging the actual mailing of letters signed by petitioners, or either of them.

No use of the United States mails is shown in connection with American Securities Trust or Mutual Trust Shares. And the one letter, signed by Cooperative Trust Shares, is not related to the sale of shares in any manner whatsoever; neither does it set forth any one of the alleged specific representations mentioned in the indictment.

No charge is made that Mrs. Heefner ever purchased any stock of any of the companies or was solicited to purchase, or that the stock certificate referred to in this letter was a stock certificate of any of the companies mentioned in the indictment.

The petitioners contended that Count I did not charge an offense, over the objection of the United States Attorney who claimed the sufficiency of the indictment could not be questioned under a plea of *nolle contendere.* (Tr. 207-218.) However, the Government admitted such right in argument before the Circuit Court of Appeals.

Count XII of the indictment (Tr. 12-18), it is said, purported to charge a violation of Section 77q (a) (2) of T. 15 of

the U. S. C. No letters or writing appear in Count XII except as Count XII incorporated by reference all of Count I, and that part of Counts II and III embracing two form letters. Counts I, II, and III were all based on Section 338. These form letters were quarterly reports sent to shareholders of Mutual Trust Shares and Cooperative Trust Shares, enclosing dividend checks and making a report on general economic conditions. These reports are addressed "To Shareholders" as distinguished from any particular person. Hence, they are not letters or writings sent through the mails, soliciting the sale of shares of stock in either Mutual Trust Shares or Cooperative Trust Shares. These reports were sent only to those who were already shareholders.

This Court should note that no letter or writing of any kind is set forth in either Count I or Count XII which has any relation or reference to American Securities Trust.

The position of the Government, as expressed by the United States Attorney was, first (Tr. 30):

> "The counts of the Indictment to which the defendants pled *nolle contendere* are based upon the fraud involved in the sale of the shares of the three common law trusts previously mentioned, namely, the American Securities Trust, Mutual Trust Shares, and Cooperative Trust Shares."

Later, the Government stated its position, and indicated that petitioners were prosecuted, not for violation of the mail fraud statute and the Securities Act of 1933, but for making alleged illegal loans, designated "diversions". The United States Attorney made the following statement (Tr. 236):

> "Your Honor has perhaps gathered that the complaint of the Government in this matter is the diversion of these funds contrary to the provisions of the trust indentures, is the statement made."

No trust indenture is referred to in the indictment. No trust indenture appears in any of the evidence, with the exception of a reference to a few paragraphs appearing in statement of petitioner Dillon (Tr. 53-58).

This Court should note that under Count XII, founded on Section 77q (a) (2) of T. 15, petitioners were prosecuted for allegedly fraudulent sales in American Securities Trust. The record (Tr. 50) shows that the last sale of shares in this company was made on February 24, 1933. This date is about five months prior to July 27, 1933, the date this statute became effective. The indictment as well as the record fail to disclose any attempt to distinguish between American Securities Trust, Mutual Trust Shares and Cooperative Trust Shares, so as a matter of fact, petitioners were charged with a crime in violation of a statute not then on the statute books. (Tr. 50.)

The Government, for months prior to the hearing, had possession of the books, records, and correspondence of all companies heretofore mentioned, and also Associated Investors Corporation. The latter company is not connected with the case or mentioned in the indictment, but was used in a manner highly prejudicial to the petitioners. (Tr. 28-31-35.) (Tr. 237, Opinion.)

For a period of seven or eight months, auditors of the postal department and the Securities and Exchange Commission had been auditing these records, going back over a period of eight or nine years, and covering thousands of transactions. It was anticipated that petitioners would be given a copy of this audit and report, but this was denied to them and has been denied at all times since.

About ten days before the hearing set for November 27th, 1939, the United States Attorney delivered to petitioners a copy of a 27-page document, designated "Statement by Government of Evidence" (Tr. 27-50). It was claimed

this document represented a recapitulation of the Government's audit. (Tr. 200.) A copy of this statement was furnished each of the defendants, but neither of the petitioners ever saw the original copy furnished the trial judge until after the hearing, as it was not filed of record with the Clerk, but handed to the trial judge in chambers on Friday, November 24th, three days before the hearing, in the absence of defendants and their counsel. As to the purpose of the statement of evidence and the source of allegations therein, the United States Attorney said (Tr. 50, 200):

> "This statement has been based entirely upon evidence available in the form of oral testimony of witnesses or documentary exhibits. In our opinion, the statement establishes in detail the charges contained in Counts One and Twelve of the Indictment." (Tr. 50.)
>
> "* * * it is our position that those were misrepresentations, and therefore, under the allegations contained in this statement and the indictment, show a violation of the particular sections involved, which is the postal fraud section, and the section of the Securities Act of 1933, dealing with untrue statements of material facts and the omission to disclose material facts." (Tr. 200.)

This so-called "Statement by Government of Evidence" was unsigned, unverified, and unidentified. It is not known who prepared it. The opinion of the trial judge shows conclusively the petitioners were convicted not on the plea of *nolle contendere* to the indictments but on this so-called statement of evidence.

Your attention is directed to a statement appearing in the opinion of the Circuit Court of Appeals which shows conclusively that this Government statement was intended to supplement Counts I and XII of the indictment, which, standing alone, were insufficient to charge a crime. The Circuit Court said (see Appendix):

> "The District Attorney had also filed a typewritten statement advising the court of the testimony which he believed was available to the government to sustain the charges of the indictment. In their respective statements the defendants had also given their version of the matters covered by the statement presented by the District Attorney."

The very fact that this "Statement by Government of Evidence" was not handed to petitioners until ten or twelve days before the hearing violated every tradition of fair practice, and it may be reasonably inferred that the delivery of this 27-page statement to the trial judge, in chambers, by the United States Attorneys three days before the hearing was solely for the purpose of avoiding the rule laid down by this Honorable Court in the case of *U. S.* v. *Norris*, 281 U. S. 619, 74 L. Ed. 1076. Its purpose was to furnish the trial judge, in advance, with evidence to sustain and supplement the indictment. If this Court will look over this statement (Tr. 27-50), it will note the multplicity of conclusions, charges, and explanations which are made in this statement. Many of the statements are misleading; some are absolutely false. At no place does the Government give the trial judge a statement of the thousands of dollars repaid to shareholders who presented their certificates for redemption, which factor was referred to by the trial judge in his opinion, as one of the great difficulties confronting petitioners. (Tr. 237-238.) Neither does the Government make any allowance for the abnormal economic conditions or the bona fide losses suffered by reason of sudden and unexpected declines in the value of stocks listed on the New York Stock Exchange.

On the day of the hearing, no witness took the stand to identify this statement and be subjected to cross examination. No witness took the stand to testify from whence came the facts and figures which appeared in this statement. No books or records were produced in the court room for iden-

tification and which petitioners might examine. No expert took the stand for the purpose of testifying that the recapitulation of figures appearing in the statement were correct, but on the contrary, the trial judge, amazingly, accepted the facts set forth in the "Statement by Government of Evidence" on the professional word of the United States Attorney, who did not take the stand as a witness, who was not even sworn, *and who did not say at that time, or any other time, that the facts set forth were true.* Let the record speak for itself (Tr. 222):

> "The Court: Nobody signed it, I notice. It is not prepared to be signed by anybody. It says it is filed by the United States Government.
>
> Mr. Valentine: I understand it is not necessary. We can proceed if you desire. We are assuming in this type of *nolo contendere* plea that it is not necessary. However, for the purpose of the record we will sign the statement.
>
> The Court: You are giving me your professional word that you have made investigation of the statements and they are true and correct, that is what you are trying to do now. Of course heretofore it has not been certified by anybody as being true or correct or anything.
>
> Mr. Valentine: We will sign it.
>
> The Court: *Your word is just as good in the record. I will take your word for that.*" (Italics supplied.)

This "Statement by Government of Evidence" devoted substantially 27 pages to one theme, namely, there had been a "diversion" of funds from these various trusts, contrary to the provisions of the trust indenture. No trust indenture appears in the evidence, nor was it referred to in the indictment. The petitioners assert this conviction was based, not upon the charges in Counts I and XII, but on the statements contained in the Government's statement, which was a type of "bootleg" document handed to the trial judge in chambers in advance of the hearing to avoid the legal conse-

quences of being introduced as an exhibit, and drafted and written for the sole and only purpose of creating prejudice.

The United States Attorneys, having retained their so-called statement of evidence until almost the last minute, petitioners could not, in the few days at their command, answer the charges and innuendos contained in this statement. However, they did prepare and file a straightforward, truthful account of the development of the various companies mentioned in the indictment and the results accomplished over a period of years. (Tr. 50-157.) These statements were handed to the trial judge by the clerk of court on the same day but after the trial judge had received the Government statement. Each of the petitioners took the witness stand, testified as to the truth of these statements under oath, and subjected themselves to cross examination. (Tr. 219, 220.) The Government did not see fit to cross examine them, so the facts set forth in the statements of petitioners stand uncontradicted, and *represent the only facts in the case established in a competent manner and in accordance with the rules of evidence.*

On November 27th, 1939, the day of the hearing, the petitioners filed a motion which

(a) attacked the sufficiency of Counts I and XII;

(b) set up the statute of limitations for the purpose of showing that not only was there a failure to show in Counts I and XII that the purported charge was within the statute of limitations (Appendix), but also claiming that the statute of limitations was a complete bar to prosecution as well as punishment of petitioners;

(c) charged that the statute upon which Count XII was predicated was unconstitutional and void;

(d) claimed that the securities of all companies mentioned in the indictment were exempt from Section 77q (a) (2);

(e) claimed that defendants were subjected to double jeopardy.

This motion was overruled by the court (Tr. 217), and all objections made by the Government to the offer of proof by petitioners as to the facts showing the tolling of the statute of limitations, were sustained. (Tr. 204-207; 218.)

The setting up by the petitioners of the bar of the statute of limitations requires some explanation. The indictment was returned on or about April 13, 1939. The record shows (Tr. 50) without dispute, that the last sale of shares in American Securities Trust was made on February 24, 1933, more than six years before the indictment was returned. The last sale of shares in Mutual Trust Shares was made December 30th, 1935, more than three years prior to the return of the indictment. (Tr. 51.) Obviously, these facts constitute a complete bar to the prosecution, trial, and punishment of the petitioners, as the sale of shares in these two companies is entirely without the statute of limitations. The trial judge, because of the plea of *nolle contendere,* imposed sentence, notwithstanding the bar of the statute of limitations was raised both properly and timely. The punishment, therefore, insofar as these two companies are concerned, rests on acts entirely without the statute of limitations. To illustrate the position of the trial judge, we quote from the record (Tr. 205, 206):

> "The Court: Why, yes, unless you can show me evidence. As I understand, what you are trying to do is to establish a date of the last sale for the purpose of claiming that this indictment is barred by the statute of limitations, and if you can show me any authority you have any right to—he has got a United States Supreme Court decision squarely to the effect you cannot do it. Sustained, unless you can show me some authority to the contrary. (Defendants except.)"

Presumably the trial judge was referring to the case of *United States* v. *Norris,* 281 U. S. 619, 74 L. Ed. 1076, as no other case was suggested. However, this was not material,

because the Government had permitted the statement of petitioner Dillon (Tr. 50-112) to stand, and in this statement the date of the last sales of shares in all companies had been set out. These facts were not denied by the Government, and so must be accepted as true.

The petitioners were sentenced for acts which were definitely without the statute of limitations.

Argument of counsel for petitioners was arbitrarily curtailed. (Tr. 217.) The Court, in overruling the motion said (Tr. 217):

> "The Court: I don't believe I want to hear any further arguments. I don't want to be arbitrary about anything that has to do with the question of whether there is any case here at all, but I have wrestled with these questions and have some information about the manner of drawing indictments too. I have found out I can't control the drawing of indictments. Some of my theories as to what should be done here have been accepted by the courts. I have wrestled with this same question before. I have had to give up my opinion about it."

Testimony of the good character of the defendants and the high standing they enjoyed in their community, was offered without objection on the part of the Government. No testimony was offered contradicting this evidence. (Tr. 218, 219.)

The trial judge rendered an opinion which shows conclusively on its face it was based entirely on the Government's so-called statement of evidence, and apparently completely ignored the alleged charges in Counts I and XII of the indictment. The petitioners were sentenced not for a violation of Section 338 or 77q (a) (2), but on an alleged violation of a trust agreement. The Circuit Court of Appeals emphasizes this point in one of the latter paragraphs of their opinion, where they say (Appendix):

> "We find nothing in the remarks made by the court in the course of imposing sentence to justify criticism. The court expressed severe condemnation of the breaches of trust committed by the defendants before him and such was his duty."

The charge against petitioners was obtaining money and property by fraud through the use of the United States mails. Yet the United States attorney says the prosecution was for the violation of a trust indenture. (Tr. 236.) The Circuit Court of Appeals says petitioners were properly censured for these "breaches of trust". Neither the trial judge nor the Circuit Court showed how any act of petitioners operated to violate the mail fraud statute or the Securities Act of 1933.

There is not one word in this opinion of the Trial Judge concerning any element of the crimes defined in these two statutes, or any mention of these statutes or a violation of them. Neither is there any reference whatever to the use of the United States mails.

Prior to imposition of sentence there was no judgment of conviction or adjudication of guilt on the part of the petitioners with reference to the nature of the offense charged or for which they were ostensibly convicted, and no reference to any statute alleged to have been violated.

Neither of the petitioners was interrogated by the trial judge before passing sentence, as to whether they had anything to say why sentence should not be pronounced.

The following sentence was delivered from the bench by the trial judge in the presence of the defendants and just prior to the adjournment of court for the day and for the term (Tr. 241):

> "It will be the order of this court that Mr. Dillon be committed for a period of five years and fined a thousand dollars on each count, running concurrently, and Mr. Crowley's is to be three years on each count and a thousand dollars fine."

In view of the severity of the sentence, this Court will be interested in various commendatory statements made by the trial judge during the proceedings and in his opinion. These thoughts expressed by the trial judge, and his denouement are inconsistent, to say the least. We quote from the record:

(a) (R. 223) "I don't think there is anything in there that either of these men took anything out of this, so far as the evidence shows. You don't need to bother about that."

(b) (R. 236) "There is no evidence that would indicate in any way that these defendants started out in the forming of these companies with the purpose and intent on their part at the time the companies were organized to use them for ulterior purposes, but on the other hand that they were conceived with the highest ideas of being a very fine business idea and one that would not only make a little money for themselves but also money for those who cared to invest in them. I don't think there is any question about that."

(c) (R. 237) "Anyway, there is no reflection, no showing but what they were all, as far as their institutions were concerned, generally honorable and with the best of intentions, so, I have no reflections on that at all in the way of complaint. There are several things the trouble here. One of them Mr. Dillon himself pointed out. One of the very bad features of the trust arrangement was that they would buy back at market price the shares of anybody who wanted to offer them. That made a bad situation, because, if things went bad everybody rushed in for their money and the Cooperatives were all broke."

(d) (R. 238) "Now, I recognize that the bad mistake in the getting up of the trust was that arrangement agreeing to buy it back. * * * I might add to what I have already said, I do not think these men here were dishonest in the sense that they would go and take another man's money. I think if one of them had suggested to the other, you go in there and get some of that money that is in there and put in a false statement and take the money out, I don't believe they would even have thought of such a thing."

(e) (R. 240) "It has been testified here by the very finest men in town that you have heretofore had a very high and enviable character and reputation."

Subsequent to adjournment of court for the day and for the term, there was prepared by the Clerk a judgment entry and commitment approved by the United States Attorney and signed by the trial judge. (Tr. 164-167.) This judgment entry, purporting to set forth the sentence, contained provisions utterly at variance with the oral pronouncement made in the presence of the petitioners and their counsel. When or where this was prepared, the petitioners cannot say, as it was done in their absence and in the absence of their counsel, and without the knowledge or consent of petitioners and their counsel. The record shows entries to have been filed on the day of the hearing, but obviously it was after sentence was imposed and it is the belief of the petitioners that such judgment entries were not prepared and signed until several days later.

The preparation of the judgment entry and signing of same was not known to petitioners until long after an appeal was taken to the Circuit Court of Appeals, and after the trial judge had lost jurisdiction, so that the records could not be corrected. (Tr. 308, 310.)

As there was no record of this transaction, petitioners were compelled to present the matter to the Circuit Court of Appeals in the form of affidavits. (Tr. 302-311.) These affidavits were neither answered nor denied by the Government, so must be taken as true.

The petitioners prosecuted an appeal to the Circuit Court of Appeals for the Eighth Circuit, which affirmed the judgment of the District Court. (See opinion of Appellate Court in Appendix to this Petition.)

The Circuit Court of Appeals upheld the action of the trial judge in refusing to go into the matter of the sufficiency

of the indictment. They held Count I good, and stated that "since the sentence imposed did not equal the maximum fixed by the applicable statute," and the sentences were to run concurrently, it made no difference whether or not Count XII was good. However, this is an erroneous statement on the part of the Circuit Court of Appeals, as the trial judge did in fact attempt to impose the maximum sentence on petitioner Dillon under Count I. (Tr. 241.)

Speaking of Count XII, the Circuit Court of Appeals said (Appendix):

> "We think it also stated an offense."

Does this amount to a judicial finding of fact? Has the Circuit Court of Appeals judicially determined that Count XII does state an offense, and in such language that it would constitute a bar to former jeopardy? We think it has not determined this question.

The Circuit Court of Appeals also stated in its opinion (Appendix) that the petitioners were given full opportunity to give their version of the matters involved and the charges against them. This is an erroneous statement, as the record discloses that the trial judge sustained objections to every effort of petitioners' counsel to introduce evidence and argue legal questions. (Tr. 204-207) (Tr. 217-218).

The Circuit Court of Appeals misinterpreted petitioners' assignments of error (Tr. 263-264) dealing with the fact that Count XII, charging an offense under Sec. 77q(a) of T. 15, incorporated Count I which charged an offense under Section 338 of T. 18. The objection was not that petitioners were joined as defendants in the same indictment or that a violation of the mail fraud statute was joined in the same indictment with a violation of Section 77q(a) (2). The objection of petitioners was that two separate and distinct statutes were joined in the same count by reason of the incorporation of Count I in Count XII.

With reference to petitioners' attack on the ambiguous oral sentence and the invalid judgment, the Circuit Court of Appeals took the position that the Clerk's formal entry of judgment and commitment was entirely regular, and was to be considered as the judgment in the case, regardless of the fact that it was utterly at variance with the pronouncement of the trial judge made in the presence of the defendants and their counsel, and that these changes were made after adjournment of court for the day and the term, in the absence of defendants and their counsel and without their knowledge and consent. This ruling of the Appellate Court is contrary to and in direct conflict with every applicable decision of this Honorable Court and other circuit courts.

The Circuit Court of Appeals upheld the trial judge's attempt to impose a sentence on petitioner Dillon two years in excess of that imposed on petitioner Crowley (Tr. 241), based on the fact that he believed certain conjectures to be true, and this not withstanding that under a plea of *nolle contendere*, no issue of facts exists. (See Appendix.)

The opinion of the Circuit Court of Appeals states that the trial judge "expressed severe condemnation of the breaches of trust committed by the defendants before him,". This statement supports the contention of the petitioners that they were sentenced, not for the crime attempted to be charged in the indictment, but for a "breach of trust". Apparently the Appellate Court fell into the same error as that committed by the trial judge in this respect. (Appendix.)

According to the opinion of the Circuit Court of Appeals, the petitioners, because of entering a plea of *nolle contendere*, were not entitled to a fair hearing, as guaranteed to them by the Constitution of the United States. We quote from the opinion:

> "The appellants have no standing, in view of their pleas of *nolo contendere*, to argue that they did not have a fair trial. By entering their pleas they precluded a trial."

Various serious and flagrant errors were committed by the trial judge in his rulings, and in the rejection of evidence, to all of which exceptions were duly taken, but notwithstanding these errors, the judgment of the trial judge was affirmed on appeal.

The opinion of the Circuit Court of Appeals is very brief, and in addition to the affirmance of the aforementioned matters, it either ignores or fails to comment on several important constitutional and jurisdictional questions pressed to its attention, both in the argument in chief and on petition for rehearing, and now presented to this Honorable Court for its serious consideration.

In support of this petition for writ of certiorari, the following questions are presented for the consideration of this Honorable Court.

I.

SINCE THE SENTENCE IS THE JUDGMENT, WHERE AN ORAL PRONOUNCEMENT OF SENTENCE IMPOSES A FINE WITHOUT PRESCRIBING IMPRISONMENT FOR ITS ENFORCEMENT, A PROVISION FOR IMPRISONMENT FOR NON-PAYMENT OF FINE AND COSTS, INSERTED BY THE CLERK IN THE JUDGMENT AND COMMITMENT, ALTHOUGH SIGNED BY THE TRIAL JUDGE, IS VOID AND OF NO EFFECT. SUCH ADDED PENALTY IMPOSED AFTER ADJOURNMENT OF COURT AND IN THE ABSENCE OF DEFENDANTS AND THEIR COUNSEL VIOLATES THE FIFTH AMENDMENT TO THE CONSTITUTION, GUARANTEEING DUE PROCESS OF LAW.

The oral pronouncement of sentence was as follows (Tr. 241):

> "It will be the order of this court that Mr. Dillon be committed for a period of five years and fined a thousand dollars on each count, running concurrently, and Mr. Crowley's is to be three years on each count and a thousand dollars fine."

The written judgment and commitment prepared and entered by the Clerk of the Court imposed an added penalty, as follows (Tr. 165):

> "* * * and that said defendant be further imprisoned until payment of said fine and costs, or until said defendant is otherwise discharged as provided by law."

A printed form designated "Judgment and Commitment" became the commitment in this cause, the following statement appearing on this form (Tr. 165):

> "IT IS FURTHER ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the same shall serve as the commitment herein."

Justice Cardozo, in the case of *Hill* v. *United States*, 298 U. S. 460, 80 L. Ed. 1283, said, on pages 1286 and 1288:

> "That court * * * requested our instructions upon the following questions:
>
> " 'No. 1. Was the provision in the commitment for imprisonment and non-payment of fine and costs which was inserted by the Clerk but not included in the sentence orally pronounced by the judge, (a) void? or (b) merely irregular?' "
>
> "To the first question we say that the provision was void."

See also *Boyd* v. *Archer*, 42 F. (2d) 43 (C. C. A. 9).

In the *Hill* case, Justice Cardozo further said, page 1286:

> "Imprisonment does not follow automatically upon a showing of default in payment. It follows, if at all, because the consequence has been prescribed in the imposition of sentence. The choice of pains and penalties, when choice is committed to the discretion of the court, is part of the judicial function. This being so, it must have expression in the sentence, and *the sentence is the judgment.*" (Italics ours.)

Justice Cardozo also said, on page 1287:

> "They do not profess to regulate the form or content of the sentence, which is to be recorded by the clerk without addition or amendment."

In the case of *Wagner* v. *United States*, 3 F. (2d) 864 (C. C. A. 9), the court said:

> "Where a fine is imposed, the court may or may not imprison until the fine is paid; but, if it does imprison, the form of the *sentence* should be that the defendant be imprisoned until the fine is paid or until he be otherwise discharged by due course of law." (Italics ours.)

The trial judge allowed an exception to the judgment entry (Tr. 165, 167), and on appeal to the Circuit Court of Appeals, Assignment of Error No. 29 (Tr. 274) covered the objection to this additional punishment not embraced in the sentence. The question was placed squarely before the Appellate Court, who affirmed the judgment of the court below, completely ignoring the applicable principles laid down by this Honorable Court in the *Hill* case. (See opinion of Circuit Court in Appendix.) The Appellate Court in affirming this judgment is also in conflict with the Tenth Circuit in the case of *Watkins* v. *Murray*, 106 F. (2) 360 (C. C. A. 10), in which the court said:

> "The judgment is the pronouncement of the court from the bench. The clerk's entry is not the judgment, but merely the formal evidence thereof. Nor is the commitment the judgment. Rather it is the final process of carrying the judgment into effect. The real authority for the execution of the sentence is the judgment. The commitment is mere evidence of such authority and if the commitment is not in accord with the judgment, the latter may be resorted to on habeas corpus for the purpose of determining whether the detention of the prisoner is lawful."

The trial judge, in signing the written memorandum and commitment prepared by the Clerk, violated the rules of the

Supreme Court of the United States (May 7, 1934), in that said written evidence of the sentence did not in fact accurately set forth the oral pronouncement of sentence, but was a substantial departure therefrom both in form and substance, thereby rendering said judgment and commitment void. These rules have the force and effect of a statute. *Berkowitz* v. *U. S.*, 90 F. (2d) 881 (C. C. A. 8).

We call attention to the case of *Bowles* v. *State*, 28 Ala. App. 574, 190 So. 102, wherein the court said:

> "'* * * the recitals of the clerk as to what took place were not adjudications by the court.'"

It might also be noted that the commitment (Tr. 165) does not set forth the amount of the costs or the amount, if any, taxed against petitioners. In this connection, we call attention to the case of *Ex parte Flippo*, 67 P. (2) 976 (Okla.), wherein it is said, on page 977:

> "The commitment is void for uncertainty. No one could read this commitment and tell what amount of costs had been taxed against the petitioner or why it was taxed, if taxed at all."

What does the Circuit Court mean where they say (Appendix): "Proper commitments will doubtless issue upon the sentences as they appear of record." Does the Circuit Court mean the sentence delivered from the bench or does it mean the Clerk's entry which is wholly at variance with the oral sentence?

The written judgment prepared by the Clerk of the Court, approved by the United States Attorney, and signed by the trial judge, was prepared and signed subsequent to adjournment of court for the day and for the term, in the absence of the petitioners and their counsel, and without their knowledge or consent, and did not come to the attention of the petitioners until some time after an appeal was taken to

the Circuit Court of Appeals. Any such action taken or added penalty imposed, or any substantial departure from the sentence such as herein occurred violates the Fifth Amendment to the Constitution, which guarantees that no citizen shall be deprived of liberty without due process of law. See *Puccinelli* v. *U. S.*, 5 F. (2) 6 (C. C. A. 9).

There being no written record of this illegal proceeding, the petitioners were compelled to submit the error to the Circuit Court of Appeals by way of affidavits filed with the Circuit Court in connection with Assignment of Error No. 29. (Tr. 302-311.) No denial or counter affidavits were filed by the Government and therefore the affidavits must be taken as true.

The petitioners assert there is no legal sentence of imprisonment and question all other proceedings. No question raised is to be taken as a waiver of any other objection or question.

II.

DUE PROCESS OF LAW, GUARANTEED BY THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES, REQUIRES THAT AFTER INDICTMENT FOR A FELONY, THE DEFENDANT IS ENTITLED TO BE PRESENT DURING THE WHOLE PROCEEDINGS, AND ANY ACTION TAKEN IN HIS ABSENCE IS VOID AND OF NO EFFECT.

This Court's attention is directed to the Transcript of Record, (Tr. 302-311) where there are set forth affidavits signed by petitioners and their counsel relative to the proceedings had in their absence and without their knowledge or consent, which proceedings took place after adjournment of court for the day and for the term. These proceedings are also discussed in other sections of this petition. Copies of these affidavits were served in due and timely course on the United States Attorney (Tr. 311). The affidavits were

neither answered nor denied, and hence the facts set forth therein must be taken as true and correct. See *State* v. *Wolf*, 266 N. W. 116 (S. Dak.) 104 A. L. R. 464.

While it is true there are circumstances under which the absence of a defendant from the trial may be waived, it will be observed that in the case at bar, the absence of defendants and their counsel was due to the fact that court had adjourned for the day and for the term, and they were not advised of any further proceedings; hence there could be no waiver. The defendants did not know of these proceedings until after appeal had been taken to the Circuit Court of Appeals. (Tr. 308, 310.)

This Honorable Court, in the case of *Lewis* v. *United States*, 146 U. S. 370, 36 L. Ed. 1011, has said:

> "A leading principle that pervades the entire law of criminal procedure is that, after indictment found, nothing shall be done in the absence of the prisoner."

We quote from *Hopt* v. *People of Utah*, 110 U. S. 574, 28 L. Ed. 262, wherein this Court said:

> "We are of opinion that it was not within the power of the accused or his counsel to dispense with the statutory requirement as to his personal presence at the trial. * * * the Legislature has deemed it essential to the protection of one whose life or liberty is involved in a prosecution for felony, that he shall be personally present at the trial when his substantial rights may be affected by the proceedings against him. If he be deprived of his life or liberty without being so present, such deprivation would be without that due process of law required by the Constitution."

This Honorable Court has also expressed its views on this subject in *Ball* v. *United States*, 140 U. S. 118, 35 L. Ed. 377, at page 383.

The ruling in *Ex parte Waterman*, 33 Fed. 29, is also in point:

> "It cannot be denied that the authorities are unanimous in holding that, where the slightest corporal punishment is inflicted, the defendant must be present in court when the sentence is pronounced. * * * This rule must, it would seem, *apply with equal force to all subsequent modifications of the sentence proper*, though apparently formal and unimportant. The moment the right to change the sentence at all, in the absence of the defendant, is conceded, the door is open to the admission of the most radical and sweeping amendments, in direct violation of the humane principle upon which the rule in question rests." (Italics ours.)

Still another case, *Fels* v. *Snook*, 30 F. (2d) 187 (D.C. N.D. Ga.) supports our contention. The court said:

> "The substance of an imprisonment sentence is that part of it which prescribes the kind and amount of the punishment. These elements of it the court cannot change, in the absence of the defendant, or after trial jurisdiction had ceased by the expiration of the term or by the sentence going into execution."

Another case in point is *Price* v. *Zerbst*, 268 Fed. 72 (D.C.N.D. Ga.)

We quote from *In Re Bonner*, 151 U. S. 242, 38 L. Ed. 151, wherein this Court said:

> "We * * * are of opinion that in all cases where life or liberty is affected by its proceedings, the court must keep strictly within the limits of the law authorizing it to take jurisdiction and to try the case and to render judgment. It cannot pass beyond those limits in any essential requirement in either stage of these proceedings; and its authority in those particulars is not to be enlarged by any mere inferences from the law or doubtful construction of its terms. There has been a great deal said and written * * * as to the jurisdiction of the courts in criminal cases. From a some-

what extended examination of the authorities we will venture to state some rule applicable to all of them, by which the jurisdiction as to any particular judgment of the court in such cases may be determined. It is plain that such court has jurisdiction to render a particular judgment only when the offense charged is within the class of offenses placed by the law under its jurisdiction; and when, in taking custody of the accused, and in its modes of procedure to the determination of the question of his guilt or innocence, and in rendering judgment, the court keeps within the limitations prescribed by the law, customary or statutory. When the court goes out of these limitations its action, to the extent of such excess, is void."

In the case of *Havenor* v. *State*, 125 Wisc. 444, 104 N. W. 116, at page 117, the court said:

"For the attainment of the best administration of justice, the law requiring that all proceedings of courts be open and public, and in the presence of the parties or their representatives, must be strictly enforced; and, in case of any infringement of this policy, *parties are not to be put to the burden of showing that it in fact injured them,* * * *. We are constrained to hold that the communications had between the jury and the judge in the case after the jury had retired to deliberate upon the verdict were prejudicial, and constitute reversible error."

See also *State* v. *Sommers*, 60 Minn. 90, 61 N. W. 907, wherein the court said:

"But in this connection there comes in another familiar principle in the administration of justice, viz. that in a prosecution for felony the accused must be, and has a right to be, present at every stage of the trial; at least, unless he has waived that right."

The Circuit Court of Appeals ignored the error assigned contending (Tr. 274) that the petitioners had a constitutional right to be present at all proceedings.

III.

AN ORAL PRONOUNCEMENT OF SENTENCE REQUIRES THE USE OF METICULOUSLY PRECISE LANGUAGE, AND IF A DEFENDANT IS TO BE IMPRISONED, THE SENTENCE MUST SO STATE; OTHERWISE, THERE IS NO SENTENCE OF IMPRISONMENT. UNDER SUCH CIRCUMSTANCES, THE ATTEMPTED IMPRISONMENT OF THE DEFENDANT BY VIRTUE OF A JUDGMENT AND COMMITMENT PROVIDING FOR IMPRISONMENT WOULD DEPRIVE HIM OF LIBERTY WITHOUT DUE PROCESS OF LAW, IN VIOLATION OF THE FIFTH AMENDMENT TO THE FEDERAL CONSTITUTION.

The penalty clause under Section 338 of T. 18 of the U. S. C. is as follows:

> "* * * shall be fined not more than $1,000, or imprisoned not more than five years, or both."

The penalty clause, (Sec. 77x), governing a violation of Section 77q (a) (2) of T. 15 of the U. S. C. provides as follows:

> "* * * shall, upon conviction, be fined not more than $5,000 or imprisoned not more than five years, or both."

In the case at bar, the trial judge, referring to petitioner Dillon, said:

> "It will be the order of this court that Mr. Dillon be committed for a period of five years and fined a thousand dollars on each count, running concurrently, * * *."

The words "running concurrently" are surplusage. They are not a part of the sentence either as to kind or amount, these elements being the substance of the sentence.

It is a well settled principle of law that a sentence must be expressed in clear and definite language. In the case of *United States* v. *Daugherty,* 269 U. S. 360, 70 L. Ed. 309, this Court said:

> "Sentences in criminal cases should reveal with fair certainty the intent of the court and exclude any serious misapprehensions by those who must execute them. * * *
>
> "This and similar unfortunate causes should admonish the trial courts to require the use of meticulously precise language in all judgment entries. Especial care is essential where sentences for crime are imposed."

It is obvious that the use of the word "committed" in attempting to impose a prison sentence, is entirely inadequate. The word "committed" does not mean "confined" or "imprisoned". The penalty clauses say "imprisoned", and no other language constitutes a sentence of imprisonment. This is not a question merely of ambiguity, but one of incompleteness. In the statement of the trial judge, the defendant was "committed" to the custody of the Attorney General. This contention is supported by the Clerk's wording of the Judgment and Commitment, which is utterly at various with the sentence (Tr. 165, 166):

> "* * * the defendant * * * is hereby committed to the custody of the Attorney General for imprisonment in an institution of the Penitentiary type * * *."

It will be observed in the above quotation that the defendant was to be imprisoned in an institution of the Penitentiary type.

Authority for this provision of the Judgment and Commitment is found in Sections 695, 753f, and 831 of T. 18 of the U. S. C. (See Appendix.) This Court will note that the language of all three statutes leads to the inevitable conclusion that the trial judge must, in imposing sentence, designate the type of institution in which the defendant is to be imprisoned. In the oral pronouncement of sentence as to petitioner Dillon, no imprisonment is provided for and

no type of institution is designated. However, if no prison sentence was imposed, as is obviously and plainly the case, this latter contention is of no importance, unless this Court should hold to the contrary.

The failure to impose a prison sentence and to designate the type of institution in which defendant shall be imprisoned, cannot be remedied by incorporating such provisions in the Clerk's entry of judgment, and this Court must hold that no legal sentence of imprisonment was imposed. The sentence in the judgment. *Hill* v. *United States*, 298 U. S. 460, 80 L. Ed. 1283. The judgment is the pronouncement of the court from the bench. The clerk's entry is not the judgment. *Watkins* v. *Murray*, 106 F. (2d) 360 (C. C. A. 10). Therefore, a judgment and commitment which sets forth provisions not to be found in the sentence from the bench is void and of no effect, and to imprison a defendant under such circumstances would be to deprive him of liberty without due process of law, in violation of the Fifth Amendment to the Federal Constitution.

Every doubt must be resolved in favor of the defendant.

It is the law which fixes the punishment. The law expresses itself through the trial judge exclusively. Otherwise, it is not expressed. The penalty clauses of both statutes in question make it discretionary *with the trial judge* as to the specific penalties imposed, provided he stays within the scope of the statute. The discretion spoken of belongs to the trial judge and to no other person. In other words, not even a court of review may interpret or construe a sentence, because in so doing, someone other than the trial judge is exercising a discretion which is vested in the trial judge alone.

The trial judge imposed a fine in the case of petitioner Dillon, using the following language:

"* * * and fined a thousand dollars on each count, * * *."

The sentence imposed with respect to the fine is clear, definite, and concise. If the indictment charged a crime, and the petitioner was guilty, no one could question the validity of the sentence so far as the fine is concerned. That being true, that part of the sentence may be separated from the rest of the sentence and enforced. *State* v. *Feilen*, 70 Washington 65, 126 Pac. 75. In such event, however, the case may not be remanded for resentence in order that a valid prison sentence may be imposed. The trial judge has imposed one of the two alternative penalties authorized by the law, and his power is exhausted. He may not upon remanding of the case, add to the penalty by imposing a valid prison sentence. *Ex parte Lange*, 85 U. S. 163, 21 L. Ed. 872.

We also call attention to the case of *Ex parte Humphrey*, 222 Pac. 366 (California), in which the court said:

> "If the sentence imposed by the court were wholly void it would still be within the power of the trial court to pronounce a valid sentence of imprisonment in the county jail. Petitioner, however, argues that the part of the sentence imposing a fine is valid, and that therefore the power of the court to sentence him is exhausted, and that he is entitled to be discharged from imprisonment. To this contention the district attorney makes no reply. Petitioner's contention seems to be well founded. *In re Sullivan*, 3 Cal. App. 193, 84 Pac. 781. The petitioner is discharged from custody."

With respect to the petitioner Crowley, the language of the trial judge was even more dubious and uncertain. The trial judge said (Tr. 241):

> "* * * and Mr. Crowley's is to be three years on each count and a thousand dollars fine."

One might ask, "What is 'to be three years on each count'?" We have here a partial statement from which certain inferences, deductions, and conclusions might be drawn. The construction we place upon the language of the court in the sentence is subject to the same principles of law applicable to a statute.

The same principles of law which have been urged with respect to the prison sentence of petitioner Dillon apply with equal force in the case of petitioner Crowley. Under no circumstances can it be said that petitioner Crowley has been sentenced to prison.

The sentence of petitioner Crowley must stand alone. It is not to be interpreted by surrounding circumstances or other portions of the record. It is the trial judge alone who may express the "will of the law". Defendants, even though jointly indicted, must be sentenced separately. The pronouncement of the trial judge with respect to petitioner Crowley has no point when separated from the pronouncement with respect to petitioner Dillon, and even when interpreted in conjunction with that of petitioner Dillon, does not commit him to prison. Every doubt must be resolved in favor of the defendant.

Exceptions were allowed defendants on the sentence of the trial judge (Tr. 241) and error assigned and argued. (Tr. 268, 269, 274.) The Circuit Court of Appeals commented on the error, (Appendix) but wholly missed the legal point involved, ruling, in effect, that the trial court could, in the absence of the defendants and their counsel, and after adjournment of court for the day and for the term, change the sentence which had theretofore been pronounced in the presence of the defendant.

IV.

IF THE ORAL PRONOUNCEMENT OF SENTENCE RELATING TO IMPRISONMENT IS INCOMPLETE, VAGUE, INDEFINITE, AND AMBIGUOUS. IT DOES NOT CONSTITUTE A SENTENCE, AND THE CLERK IN PREPARING JUDGMENT ENTRY AFTER ADJOURNMENT OF THE COURT FOR THE DAY AND FOR THE TERM IN THE ABSENCE OF THE DEFENDANTS AND THEIR COUNSEL AND WITHOUT THEIR KNOWLEDGE OR CONSENT, IS WITHOUT AUTHORITY TO AMEND SUCH ATTEMPTED PRISON SENTENCE BY TRANSPOSING FROM THE CLAUSE IMPOSING THE FINE, WHICH IS LEGALLY EXPRESSED, THE WORDS "ON EACH COUNT", IN ORDER TO COMPLETE THE SENTENCE OF IMPRISONMENT.

For the convenience of this Court, we again quote the pronouncement of sentence by the trial judge (Tr. 241):

> "It will be the order of this court that Mr. Dillon be committed for a period of five years and fined a thousand dollars on each count, running concurrently, and Mr. Crowley's is to be three years on each count and a thousand dollars fine."

The sentence of petitioner Dillon as set forth in the judgment entry prepared by the Clerk and signed by the trial judge, after adjournment of court for the day and for the term, in the absence of petitioners and their counsel and without their knowledge and consent, is as follows (Tr. 164, 165):

> "The defendant having been convicted on his plea of *Nolle Contendere* of the offenses charged in Counts One and Twelve of the Indictment in the above-entitled cause, to-wit vio. of Sec. 338, T. 18, U. S. Code and Violation of Sec. 77-Q, Title 15, U. S. Code, * * *
>
> "and the defendant having been now asked whether he has anything to say why judgment should not be pronounced against him, and no sufficient cause to the contrary being shown or appearing to the Court, It Is By The Court

"Ordered and Adjudged that the defendant, having been found guilty of said offenses, is hereby committed to the custody of the Attorney General for imprisonment in an institution of the Penitentiary type to be designated by the Attorney General or his authorized representative for the period of Five (5) years and make his fine unto the United States of America in the sum of One Thousand & 00/100 ($1,000.00) Dollars and costs of this action taxed at $....., under Count One (1) of the Indictment; and for a period of Five (5) years under Count Twelve (12) of the Indictment. It is further Ordered that the judgment under Count Twelve (12) shall run concurrently with the judgment under Count One (1) of the Indictment, and that said defendants be further imprisoned until payment of said fine and costs, or until said defendant is otherwise discharged as provided by law. Defendant excepts.

(Note: Paragraph relating to suspension of commitment for ten days omitted.)

"It Is Further Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the same shall serve as the commitment herein.

CHAS. A. DEWEY, *Judge.*

Approved Nov. 27, 1939.

JOHN K. VALENTINE,
United States Attorney."

The responsibility for the juggling of words cannot be determined by the petitioners. The words "on each count" (see oral sentence above) which appear in that part of the sentence imposing the fine, in effect disappear and are then inserted in that part of the sentence imposing a prison sentence. The result is that petitioner Dillon's sentence is, *in effect,* changed to read as follows:

"It will be the order of this court that Mr. Dillon be committed for a period of five years *on each count* and fined a *thousand dollars.*"

The same form of judgment entry was drawn up by the Clerk for petitioner Crowley. (Tr. 166, 167.) It also shows a variance between the judgment and commitment and the sentence of the trial judge, as well as false statements as to what actually was done. While it is true that the recitals of the Clerk in the judgment are not an adjudication of the court (*Bowles* v. *State*, 28 Ala. App. 574), yet this Court will observe in the case at bar the judgment entry and commitment is not signed by the Clerk but by the Honorable Charles A. Dewey himself. In other words, he authenticates every statement in the judgment entry, even though it is at variance with the pronouncement from the bench, and untrue. *Obviously the trial judge had no authority to sign an untrue statement.*

In support of petitioners' contention that final judgment is the pronouncement of the trial judge from the bench, we refer this Court to the case of *Watkins* v. *Murray*, 106 F. (2d) 360 (C. C. A. 10), in which the court said:

> "The judgment is the pronouncement of the court from the bench. The clerk's entry is not the judgment, but merely the formal evidence thereof."

And in the case of *Hill* v. *U. S.*, 298 U. S. 460, 80 L. Ed. 1283, at page 1287, the Court says in substance that the sentence is to be recorded by the clerk without addition or amendment.

Petitioners state that in violation of repeated rulings of this Honorable Court and other courts, the sentences in the case at bar as recorded by the Clerk are utterly at variance with the pronouncement of the trial judge. The formal judgment entry contains misstatements, additional punishment and other departures as follows:

> (a) The Judgment and Commitment states that defendant "having been convicted on his plea of *Nolle Contendere* of * * * vio. of Sec. 338, T. 18, U. S.

Code and Violation of Sec. 77-Q, Title 15, U. S. Code, * * *". The defendants were not adjudged convicted, before pronouncement of sentence, of a violation of these statutes or any other statutes, and the record so discloses. (Tr. 236-241.)

(b) The judgment further recites that "* * * the defendant having been now asked whether he has anything to say why judgment should not be pronounced against him, * * *." Neither defendant was interrogated, and the record so discloses. (Tr. 241.) In felony cases this is a mandatory requirement. *Ball* v. *U. S.*, 140 U. S. 118, 35 L. Ed. 377 at 383.

(c) As has been discussed in other sections of this Petition, the Judgment entry attempted to dispose of the lack of designation of counts and an ambiguity as to counts in the oral pronouncement.

(d) The Judgment entry imposed an additional penalty, not incorporated in the sentence, in that it specified that defendants "be further imprisoned until payment of said fine and costs, or until said defendant is otherwise discharged as provided by law."

(e) The Judgment and Commitment provided that the defendants were "committed to the custody of the Attorney General for imprisonment in an institution of the Penitentiary type * * *". No type of institution was designated by the trial judge in his sentence.

Error was assigned on this point. (Tr. 270-274.)

V.

A PRISON SENTENCE WHICH IS AMBIGUOUS AS TO WHICH COUNT OF AN INDICTMENT IT SHALL APPLY IS NOT GOOD AS TO EITHER, BUT VOID, AND THE SENTENCE MUST BE MODIFIED BY ELIMINATING THE PRISON CLAUSE, BUT PERMITTING TO STAND, AS IT MUST STAND, A LEGAL IMPOSITION OF A FINE.

For the convenience of this Court, we again set forth the oral pronouncement of sentence in the case of petitioner Dillon (Tr. 241):

"It will be the order of this court that Mr. Dillon be committed for a period of five years and fined a thousand dollars on each count, running concurrently, * * *".

It will be noted that the trial judge has not stated whether petitioner Dillon is sentenced for a period of five years on one count, or on each count. The statement is that he is to be committed for a period of five years, and that he is to be fined a thousand dollars on each count. If he is to be committed for a period of five years only, then we ask whether this is five years on one count, and if so, which count, or whether the five years is to be divided between each count.

We call this Court's attention to the case of *Goode* v. *United States*, 12 F. (2d) 742 (C. C. A. 8), wherein the court said:

"As we understand the rule, it need not specifically and conclusively appear that the imprisonment was imposed on the wrong count, but if it be indefinite and ambiguous as to which count it should be applied it is not good as to either but void. * * *

"The sentence is therefore modified by eliminating the clause as to imprisonment * * *."

In the case of *Wagner* v. *United States*, 3 F. (2d) 864 (C. C. A. 9), the court said:

"If the construction given the sentence by the court below is the correct one, the sentence is void; and, if two or more constructions are equally admissible, it is likewise void."

We quote also from *Daugherty* v. *United States*, 2 F. (2d) 691 (C. C. A. 8), wherein the court said:

"A prisoner is entitled to know under what sentence he is to be imprisoned. The vague words in question furnish no means of knowing. They must be regarded as without effect, * * *."

Referring to the sentence quoted above, it will be noted that the trial judge also stated that petitioner Dillon was to be "fined a thousand dollars on each count". As has heretofore been stated (Section III), this is a perfectly legal sentence so far as the fine is concerned.

While petitioners contend that there was in fact no prison sentence imposed (Section III), yet if this Court should take a contrary view, the *Goode* case quoted above should be controlling, and it was the duty of the Circuit Court of Appeals to rule that the prison clause should be eliminated, affirming the judgment with respect to the fine, assuming there were no other aspects of the case requiring a reversal.

The judgment entry, which is at variance with the sentence, is void, even though prepared by the Clerk, approved by the United States Attorney and signed by the trial judge. Errors of the trial judge whether a matter of inadvertence or otherwise cannot be fixed up in the Clerk's office after adjournment of court and in the absence of the defendants and without their knowledge or consent, particularly in a felony case.

The Circuit Court of Appeals ignored this error notwithstanding the *Goode* case from the Eighth Circuit.

VI.

WHERE AN ORAL PRONOUNCEMENT OF SENTENCE IMPOSING FINE FAILS *TO* SPECIFY THE PARTICULAR COUNT TO WHICH THE SENTENCE APPLIES, THE SAME IS VOID, NOTWITHSTANDING THE CLERK'S ENTRY OF JUDGMENT DESIGNATES THE COUNT.

Separate and distinct offenses being charged in Count I and Count XII of the indictment, it was the duty of the trial judge in passing sentence to set forth the particular count or counts on which petitioners were convicted and to which the

punishment applied. In the event of a failure to do this, the sentence is void and of no effect.

The oral pronouncement of sentence in the case of petitioner Crowley is as follows (Tr. 241):

> "* * * and Mr. Crowley's is to be three years on each count and a thousand dollars fine."

In the case of *Rossino* v. *United States*, 6 F. (2d) 350 (C. C. A. 8), the court said:

> "Again, separate counts in the same indictment or information charge separate and distinct offenses, require separate and distinct action by the court in adjudging sentence or acquittal."

We quote from the case of *Goode* v. *United States*, 12 F. (2d) 742 (C. C. A. 8), wherein the court said:

> "As we understand the rule, it need not specifically and conclusively appear that the imprisonment was imposed on the wrong count, but if it be indefinite and ambiguous as to which count it should be applied, it is not good as to either, but void."

We wish also to call this Court's attention to the opinion in *Neely* v. *United States*, 2 F. (2d) 849, at page 853:

> "We are persuaded that by far the better practice is for the trial court in its sentence expressly to apply the punishment it awards to the separate counts upon which the prisoners have been convicted, and to direct whether their punishment shall be served consecutively or concurrently. If this be done, a much simpler problem will be presented to the appellate court, in the event that in the trial below error has been committed as to the issue raised by some, but not by all, of the counts."

While this case speaks of the designation of counts being the "better practice", it is the opinion of counsel such requirement is mandatory, and failure to do so results in a sentence which is void.

And in the case of *Daugherty* v. *United States*, 2 F. (2d) 691, it is said:

> "A prisoner is entitled to know under what sentence he is imprisoned. The vague words in question furnish no means of knowing. They must be regarded as without effect, * * *."

In the case at bar, the Clerk's entry did designate the counts to which the penalties applied. However, we emphasize the rule repeatedly laid down by the courts, that the oral pronouncement from the bench, and not the Clerk's entry, is the judgment. The Clerk's entry is merely evidence of the sentence and unless the sentence is accurately transcribed the Clerk's entry is void.

Hill v. *U. S.*, 298 U. S. 460, 80 L. Ed. 1283.
Berman v. *U. S.*, 302 U. S. 211, 82 L. Ed. 203.
Watkins v. *Murray*, 106 F. (2d) 360 (C. C. A. 10).

In the case of petitioner Crowley, it is quite obvious that the fine of $1,000 may apply to either Count I or Count XII, but there is no way in which this can be definitely ascertained. That a sentence imposing a fine of $1,000 without a designation of counts is void, is self-evident for the following reasons:

(a) The defendant has a right to be advised as to what particular crime he has been convicted of.

(b) The right of appeal would be defeated, as there would be no means by which the defendant could bring before the appellate court the particular statute which he had violated.

(c) There would be no protection against double jeopardy, as required by the Fifth Amendment to the Federal Constitution.

This matter was brought to the attention of the Circuit Court of Appeals who said, in effect, that the Clerk's entry was the sentence and therefore the written entry prepared by the clerk in petitioners' absence and absence of counsel would be the final judgment; that this was not irregular even though differing from the sentence delivered from the bench.

VII.

NO ISSUE OF FACT AS TO GUILT EXISTS UNDER PLEA OF *NOLLE CONTENDERE.*

ANY IMPOSITION OF ADDED IMPRISONMENT BASED UPON CONJECTURE OR FACTS OUTSIDE OF THE RECORD, AND THEREFORE NOT SUBJECT TO REVIEW, IS VOID AND OF NO EFFECT, AND ITS ENFORCEMENT WOULD VIOLATE THE FIFTH AMENDMENT TO THE FEDERAL CONSTITUTION, GUARANTEEING THAT NO CITIZEN SHALL BE DEPRIVED OF LIBERTY WITHOUT DUE PROCESS OF LAW.

The record shows (Tr. 241) that petitioner Dillon was subjected to a prison sentence two years in excess of that imposed upon petitioner Crowley, notwithstanding petitioners were jointly indicted and each entered a plea of *nolle contendere.* The trial judge emphasized that petitioner Dillon was given this added two years because he was a lawyer and no doubt had advised his co-defendant that he was *not doing wrong.* We quote from the record (Tr. 241):

> "What has been bothering me is not about Mr. Dillon. What has been bothering me is what relation Mr. Crowley should bear to the whole thing here. I was under the impression all along that you were equally guilty with Mr. Dillon, but after Mr. Dillon made his speech in court I can see that he just has that positive assurance that he has not done anything wrong and that he does not believe he has done anything wrong, and I feel that he told you you were not doing anything wrong, and because he is a lawyer I think you are entitled to some differentiation in the sentence on that account."

One might question this type of reasoning since it is obvious that the element of guilt, if any, must be the same in both cases in the face of the allegations of the joint indictment and the plea of *nolle contendere.* There would be, of course, the privilege on the part of the court to inquire into the situation of the petitioners, their habits, previous record, their reputation for integrity and matters of a like character,

all of which would of necessity have to be introduced in evidence as a matter of record in order to afford the petitioners an opportunity of cross examination, or of offering evidence to rebut such evidence. *Zeff* v. *Sanford,* 31 Fed. Supp. 736. However, it becomes an abuse of discretion of the most serious kind when a trial judge imposes a much greater penalty on the basis of one defendant's having a sincere conviction of innocence and the fact that as a lawyer he may have in a professional capacity, advised his co-defendant of his legal rights and liberties. There could be no better example of an abuse of discretion violating the Fifth Amendment to the Federal Constitution, guaranteeing that a citizen shall not be deprived of liberty without due process of law.

There is the added error, of course, that the trial judge, in explaining the difference in sentences imposed on the two defendants, predicates his action upon certain statements or conjectures not set forth in the record or the indictment, thus affording no record for review. Under such circumstances, petitioner Dillon would be deprived of due process of law. We quote from the case of *People* v. *Brophy,* 20 N. E. (2d) 385, 280 N. Y. 181, wherein the court said:

> "The rights of defendants to review by an appellate court are frustrated if there be no accurate record upon which the court of appeal can predicate its decision. Uncertain inferences to be drawn from conflicting affidavits do not satisfy this requirement. In *People* v. *Caruso,* 249 N. Y. 302, at page 306, 164 N. E. 106, at page 108, this court said: 'Of course, before a court can impose the additional sentence under section 1944, it must have before it on the record facts to sustain such action. There must be a record made which can be reviewed. * * *
>
> "The orders should be reversed, the writ sustained, and the relator discharged from custody."

The above represents in a measure only the great departure made by the trial judge from what would constitute a fair and judicial hearing. There is not a scintilla of evi-

lence in the whole record from beginning to end from which t might be inferred or which expressly states that petitioner Dillon advised petitioner Crowley about any right or rights n this matter.

The Circuit Court of Appeals erred in passing on this Assignment of Error (No. 36, Tr. 288), and merely said that :he heavier sentence as against one defendant afforded no :omplaint for either. They entirely overlooked the principle of law announced in the case of *People* v. *Brophy*, quoted above.

VIII.

NOTWITHSTANDING A PLEA OF *NOLLE CONTENDERE*, IN A CRIMINAL CASE THERE MUST BE AN ADJUDICATION OF GUILT OR CONVICTION PRIOR TO IMPOSITION OF SENTENCE; OTHERWISE, THE TRIAL JUDGE IS WITHOUT JURISDICTION TO IMPOSE SENTENCE, AND ANY ATTEMPTED ENFORCEMENT OF SUCH SENTENCE WOULD CONSTITUTE A VIOLATION OF THE FIFTH AMENDMENT TO THE FEDERAL CONSTITUTION, GUARANTEEING THAT NO CITIZEN SHALL BE DEPRIVED OF LIBERTY WITHOUT DUE PROCESS OF LAW AND THAT HE SHALL NOT BE TWICE PUT IN JEOPARDY FOR THE SAME OFFENSE.

In the case at bar, there was no formal adjudication of guilt or conviction prior to imposition of sentence, nor can it be implied or supplied from the record itself. No valid sentence may be imposed until there is an adjudication of conviction.

A plea of guilty and a plea of *nolle contendere* admit only material facts properly pleaded in the indictment. *Schick* v. *United States*, 195 U. S. 65, 49 L. Ed. 99; *United States* v. *Lair*, 195 Fed. 47 (C. C. A. 8).

It is the duty of the trial judge, before pronouncing sentence, to consider and pass on the question of whether the

indictment charges an offense and what statute, if any has been violated. An examination of the opinion in the case at bar (Tr. 236-242) fails to disclose even a remote indication of any adjudication of conviction, or any ascertainment and designation of the statute or statutes alleged to have been violated.

In the case at bar, two different statutes are alleged to have been violated, each requiring different proof from the other, and providing different penalties. Since there is a wide range of discretion permitted the trial judge as to the specific penalty to be imposed, within certain prescribed limits, there must be a designation as to which statute is violated in order that the trial judge as well as the petitioners may be advised as to the source from which he derives his power to impose penalties. Unless there is an adjudication of conviction indicative of the guilt or innocence of the defendant as to each of the statutes involved, there could be no protection against double jeopardy.

We call this Court's attention to the case of *People* v. *Stuart*, 274 Mich. 246, 264 N. W. 359, wherein the court said:

> "Appellant complains that, notwithstanding he was charged with two separate and distinct offenses, the record does not disclose of which offense he was convicted. Embezzlement (Section 174) is punishable by a maximum commitment of ten years; but larcency by conversion (Section 362) carries a maximum commitment of only five years. The essential elements of these two statutory offenses are different. *It is a matter of right that defendant should have knowledge and have a proper record made of the exact offense of which he was convicted.* Under the probationary sentence imposed, defendant would be held constructively in the custody of the court for a period of two years without having been convicted of any specific offense. The general determination of the trial court that defendant was 'guilty as charged' was no more than a general verdict. 'A general verdict of guilty, without specifying the count or

offense on which it is founded, is invalid where there are several counts, each of which charges a separate and distinct offense, of a nature and character radically different from that in the other counts, and having no necessary connection * * *.' 16 C. J. 1105. See, also, numerous cases cited in notes. While some authority to the contrary can be found, the decidedly prevalent and better rule is that above stated. The error pointed out resulted in a mistrial.

"The judgment and sentence of the court are vacated, and a new trial granted." (Italics ours.)

The case of *Blockburger* v. *United States,* 284 U. S. 299, 76 L. Ed. 306, is also in point. In this case, the court, quoting from *Morey* v. *Com.,* 108 Mass. 433, said:

" 'A single act may be an offense against two statutes; and if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other.' "

Notwithstanding a plea of *nolle contendere,* until the defendant is adjudged convicted of the offense charged, the court has no jurisdiction, either of the person or the subject matter to pass sentence and enter judgment. We quote from the case of *Pensacola Lodge* v. *State,* 74 Fla. 498, 77 So. 613, wherein the court said:

"Where a plea of *nolle contendere* is accepted, it is not necessary in sentence to adjudge defendant guilty, but the court should adjudge him convicted of offense charged and sentenced to penitentiary provided by law."

In the case of *State* v. *Harper,* 258 N. W. 886 (Iowa), the court said:

"It would hardly seem necessary to suggest that in a matter as serious as this, where a man is being deprived of his liberty for life, it would be proper, and much the better practice, for the court to enter a judgment of conviction of the specific crime charged in the

information or indictment, and that this should be done whether the conviction results from a verdict of a jury or a plea of guilty."

We also call this Court's attention to *Com.* v. *McCarthy,* 18 Washington County Reports 182, wherein it was said:

> "The conviction and the judgment or sentence are separate and distinct things, and a sentence imposing the penalty provided for in the Act must be preceded by a conviction, that is to say, an express finding by the justice, entered upon the record, showing what fact or acts the defendant did which the justice considered to be a violation of the statute. It has been repeatedly held that a judgment or sentence cannot be sustained when it is not supported by a conviction finding what the defendant did, and stating this with sufficient particularity to exhibit the nature and character of the act; that the want of any such conviction cannot be supplied by setting forth testimony which, if believed, would be sufficient to warrant it; 34 Pa. 398, 403."

In the case of *Woodward* v. *Bridges,* 144 Fed. 156, the court said:

> "Sentence is a distinct thing from the conviction wherein it is founded. *Commonwealth* v. *Lockwood,* 109 Mass. 323, 12 Am. Rep. 699. It may be, and often is, separated from conviction by a considerable interval of time."

We wish also to call this Court's attention to the case of *Ball* v. *United States,* 140 U. S. 118, 35 L. Ed. 377, at page 383. The court said, speaking of an order of conviction:

> "It will be perceived that neither in the verdict, nor in the order of November 3 or that of November 15th, is it stated of what offense the defendants were found guilty."

The above quotation indicated the attiude of the court, and the cause would have been reversed if the court had not found that the indictments were fatally defective, requiring a dismissal.

This same question arises in the case of *Demolli* v. *United States*, 144 Fed. 363, wherein the court said:

> "Objection is made to the sentence imposed on the defendant because it does not contain a formal adjudication of his guilt or specify the offense for which he was sentenced. *If the judgment as entered were alone to be examined, the objection would be well taken.*" (Italics ours.)

In the *Demolli* case, reference is made to the case of *Pointer* v. *United States*, 151 U. S. 396, 38 L. Ed. 208, where it was held that all parts of the record are to be interpreted together, * * * and that a deficiency in one place may be supplied by what appears in another.

However, in the case at bar, there is no record from which any adjudication could be found. There was no trial by jury. There was no reference in the indictment to the particiular statutes. There was nothing whatever in the opinion of the court which would afford any clue or direction by which the statutes might be ascertained or identified. In fact, a reading of the opinion shows conclusively that the defendants were not sentenced for a violation of Section 338 of T. 18 or a violation of Section 77q (a) (2) of T. 15, but for a wholly imaginary violation of a trust indenture, a trust indenture which was non-existent in this case so far as the record is concerned.

In the case at bar, the judgment entry prepared by the clerk (Tr. 164-167) recited that the defendant was convicted of the offense charged, to-wit, violation of Sec. 338 of T. 18, U. S. Code and violation of Sec. 77-Q, Title 15, U. S. Code. However, as was said in *Bowles* v. *State*, 28 Ala. App. 574, 190 So. 102:

> "'* * * the recitals of the clerk as to what took place were not adjudications by the court.'"

The fact that the trial judge signed the judgment and commitment prepared by the Clerk setting forth the sentence, does not give it added validity. Substantially everything appearing in this judgment and commitment is at variance with what actually took place, and in some instances, absolutely false. Furthermore, it was prepared and signed by the trial judge in the absence of defendants and their counsel, and without their knowledge or consent. *The position of the petitioners is that this judgment entry which, under the rules of the Supreme Court, should have merely set forth the sentence, and nothing more, is absolutely void and of no effect.*

The printed form of the judgment entry which is filled in by the clerk is an attempted short-cut, but there is no justification for it, either in the rules or by statute.

The Circuit Court of Appeals ignored the assignment of error (No. 28, Tr. 268, 269) which called attention to the fact that no adjudication of conviction was found by the trial judge.

IX.

THE PLEA OF *NOLLE CONTENDERE* DOES NOT PRECLUDE RAISING THE QUESTION OF THE STATUTE OF LIMITATIONS AS A BAR TO PROSECUTION, TRIAL OR PUNISHMENT. THE ATTEMPTED ENFORCEMENT OF ANY SENTENCE OR JUDGMENT BASED ON AN ALLEGED OFFENSE, ALL OF WHICH, OR A PART OF WHICH IS WITHOUT THE STATUTE OF LIMITATIONS IS A VIOLATION OF THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

This court, so far as counsel can ascertain, has not at any time directly passed on the question of whether or not the statute of limitations (Appendix) may be raised in the face of a plea of *nolle contendere.* It is true that many courts are now taking the view that where the statute of limitations

has run, the court is without jurisdiction to conduct a prosecution, or trial, or to impose punishment. This would seem to be the more logical rule.

We call attention to the case of *Capone* v. *Aderhold*, 65 F. (2) 130 (C. C. A. 5), wherein the court said:

> "In some, perhaps most, of the states an indictment is fatally defective which shows on its face that it was returned after the running of the statute of limitations. However, in the federal courts the bar of the statute is a matter of defense. As we have just seen, it may be raised by an affirmative plea which is not required to negative an exception; the burden of proving the exception being upon the prosecution. But that defense cannot be taken advantage of by demurrer or motion in arrest, since the prosecution is entitled to an opportunity where the statute of limitations contains exceptions to introduce evidence and bring the defendant within one of the exceptions. *United States* v. *Cook*, 17 Wall. 168, 21 L. Ed. 538; *United States* v. *White*, 28 Fed. Cas. page 562, 568, No. 16,676; 1 Wharton's' Cr. Pro. Sec. 369. A plea in bar raises an issue and affords the prosecution an opportunity to meet it. The ordinary motion to direct a verdict is not such a plea; it is not usually made until all the evidence is in, and after it is too late for the prosecution to offer evidence in rebuttal and in contradiction of it. *Dowdell* v. *United States*, 221 U. S. 325, 31 S. Ct. 590, 55 L. Ed. 753; 1 Bishop's Cr. Pro. Sec. 730."

One of the leading cases on the subject of the statute of limitations is *U. S.* v. *Cook*, 17 Wall. 168, 21 Law Ed. 538. The court said:

> "* * * Instead of that they both decide that it is not necessary to plead the Statute of Limitations in criminal cases; that the defendant may give it in evidence under the general issue, which undoubtedly is correct, as it affords the prosecutor an opportunity, where the statute contains exceptions, to introduce rebutting evidence and bring the defendant within one of the exceptions.
>
> "Accused persons may avail themselves of the Statute of Limitations by special plea or by evidence under

the general issue, but courts of justice, if the statute contains exceptions, will not quash an indictment because it appears upon its face that it was not found within the period prescribed in the limitation, as such a proceeding would deprive the prosecutor of the right to reply or give evidence, as the case may be, that the defendant fled from justice and was within the exception. *U. S.* v. *White*, 5 Cranch, C. C., 60; *State* v. *Howard*, 15 Rich. (S. C.) 282. Nor is it admitted that any different rule would apply in the case even if the Statute of Limitations did not contain any exception, as time is not of the essence of the offense; and also for the reason that the effect of the demurrer, if sustained, would be to preclude the prosecutor from giving evidence, as he would have a right to do, under the general issue, to show that the offense was committed within two years next before the indictment was found and filed."

We quote also from the case of *Guaranty Trust Co. of N. Y.* v. *U. S.*, 304 U. S. 137, 82 Law Ed. 1224, at p. 1230:

"The statute of limitations is a statute of repose, designed to protect the citizens from stale and vexatious claims, and to make an end to the possibility of litigation after the lapse of a reasonable time. It has long been regarded by this Court and by the courts of New York as a meritorious defense, in itself serving a public interest."

The statute of limitations is usually considered a statute of repose. In criminal cases, it is considered as not only barring the remedy, but destroying the right of action as well. Consequently, in a criminal trial, the burden is on the Government to prove the commission of the offense within the statutory period, or to prove facts which would toll the running of the statute. It has been said that the issue of the statute of limitations must be determined by evidence under a plea of not guilty, since it is not a fatal variance for the Government to allege one time for the commission of the offense and prove another in crimes where time is not of the essence. However, it is in most states held that the state has

no case at all unless it can sustain the burden of proving the crime is not barred by the statute. One of the leading cases is the case of *People* v. *McGee,* 88 Cal. Dec. 324, 36 P. (2d) 378. In this case there was a plea of guilty, conviction, and a partial serving of the sentence, after which time the defendant filed a motion to vacate the judgment on the ground that the court was without jurisdiction, since it appeared on the face of the information that it was without the statute of limitations. The Supreme Court of California held the conviction should be set aside and the motion to vacate sustained.

This same rule was also held forth in *State* v. *Tupa,* 260 N. W. 875, 194 Minn. 488, where the statute of limitations was set up after the defendant had pleaded guilty. The court said:

> "The next issue presented is whether, as claimed by the state, defendant by his plea of guilty 'waived any defects in the information and the defense of the statute of limitations'. * * *
>
> "If defendant had gone to trial, the statute would have afforded him a complete bar to conviction and consequent punishment. Under such circumstances we do not believe that defendant intended to waive or relinquish a 'known right'. * * *
>
> "We conclude that upon the facts here appearing the judgment of conviction and sentence hereunder should be reversed and defendant discharged from custody."

See also *Sawyer* v. *State,* 94 Fla. 60, 113 So. 736. This same principle of law obviously applies to the plea of *nolle contendere.*

The Circuit Court of Appeals was in error in that it entirely missed the point of the question raised in the Motion (Tr. 23-26) with respect to the statute of limitations. (See assignments of error, Tr. 250-260; 280, 281, 296.) It is true that the sufficiency of the indictment was attacked on the ground that it did not show that the act complained of was within the statute of limitations, but the Circuit Court of

Appeals, in finding that Count I charged an offense, should have found that it did affirmatively so show. However, this finding by the Appellate Court would be wholly dependent upon the letter set forth in Count I signed by Cooperative Trust Shares. The petitioners, of course, most emphatically urge that the plea of *nolle contendere* does not give validity or life to this letter. This letter utterly fails to show on its face that it had anything to do with any attempted sale of shares of any of the three companies mentioned. Neither does it set forth any representation of any kind or character.

This Court will note that in addition to Cooperative Trust Shares, American Securities Trust and Mutual Trust Shares, are mentioned in Count I as being the medium through which fraud was perpetrated. The record shows conclusively (Tr. 50, 51) that the last sale of stock in American Securities Trust was made on February 24, 1933, more than six years before the indictment was returned. It also shows that the last sale of shares in Mutual Trust Shares was made December 30, 1935, more than three years before the indictment was returned. These facts were set forth in the statement of petitioner Dillon (Tr. 50, 51), but to be doubly sure, the petitioners offered evidence on this subject, which evidence, on objection of the United States Attorney, was eliminated, although it was material and should have been admitted. (Tr. 204-207.) This is obvious from the ruling in a number of cases.

X.

A SENTENCE IMPOSED ON DEFENDANTS WHICH IS BASED ON A PURPORTED VIOLATION OF A STATUTE WHEREIN THE ACTS COMPLAINED OF ARE BOTH WITHIN AND WITHOUT THE STATUTE OF LIMITATIONS, WILL BE SET ASIDE AND HELD TO BE VOID AND OF NO EFFECT.

This principle of law is obviously correct, and the record shows conclusively that petitioners were convicted for alleged

acts definitely outside the statute of limitations, and for alleged acts which (though not constituting a crime) are within the statute. It was brought to the attention of the trial judge in the statement of petitioner Dillon (Tr. 50, 51), that the date of the last sale of shares in American Securities Trust (February 24, 1933) was more than six years before the indictment was returned. The last sale of Mutual Trust Shares (December 30, 1935) was made more than three years before the indictment was returned. There was also the statement, undenied by the Government, that the mails were not used at any time within the three-year period prior to the return of the indictment in connection with the sale of shares in any one of the three companies. (Tr. 218.)

In the "Statement by Government of Evidence", the statement is made that "for the period from 1932 to 1937, a total of, roughly, $129,000 was diverted from the three common law trusts to National Securities Corporation." Here again, obviously, some part of this figure of $129,000 in without the statute of limitations.

Petitioner Dillon, in his statement submitted to the trial judge, sets out a table of figures showing dates and amounts of advances made by American Securities Trust, Mutual Trust Shares, and Cooperative Trust Shares to National Securities Trust to cover expenses of these companies being paid by National Securities Corporation. (Tr. 77-80.) A study of these figures shows that no advances were made to National by either American Securities Trust or Mutual Trust Shares subsequent to 1935. This establishes definitely that any so-called "diversions" from these two companies would be outside of the statute of limitations. With respect to Cooperative Trust Shares, the Government establishes no date of any diversion from this company; hence, the Government fails to show, either by allegations of the indictment or by way of evidence, that any alleged "diversion" from Cooperative Trust Shares is within the statute.

There is absolutely no showing by the Government either in the indictment or in any other way that any of the acts complained of were within the statute of limitations. It is definitely established everything charged to American Securities Trust and Mutual Trust Shares was without the statute of limitations.

A perusal of the opinion of the trial judge (Tr. 236-242) shows conclusively that petitioners were sentenced on this one charge—a charge of "diversion" of $129,000, although this element of "diversion" of course had nothing to do with an alleged violation of Section 338 of Title 18 of the U. S. C.

We call this Court's attention to the case of *Hogoboom* v. *State*, 234 N. W. 422 (Nebraska, 1931), in which it was held that conviction for embezzlement must be reversed where information alleges embezzlement continuously over a period, part of which is outside the statute of limitations, and both information and verdict failed to show amount embezzled within statutory period.

The court said:

> "It is manifest that such a verdict is wholly insufficient to sustain a conviction of a felony committed by the defendant within the statute of limitations. There being an essential failure of the prosecution to charge, and on the part of the jury to ascertain and declare in their verdict, the amount of money embezzled between the 6th day of December, 1926, and the 19th day of April, 1928, conviction may not be sustained."

XI.

IN THE FACE OF A PLEA OF *NOLLE CONTENDERE*, NO EVIDENCE WAS ADMISSIBLE, EITHER BEFORE OR DURING THE HEARING, ON THE QUESTION OF THE GUILT OF THE DEFENDANT. THERE WAS NO ISSUE OF FACT, AND THE "STATEMENT BY GOVERNMENT OF EVIDENCE", HANDED TO THE TRIAL JUDGE, IN CHAMBERS, THREE DAYS BEFORE THE HEARING AND IN THE ABSENCE OF THE DEFENDANTS, CONSTITUTED A VIOLATION OF THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT TO THE FEDERAL CONSTITUTION, AND NECESSITATES THE VACATING OF THE JUDGMENT OBTAINED BY REASON OF THE USE OF SUCH EVIDENCE, OR THE REVERSAL OF THIS CAUSE.

The petitioners have set out at some length in the statement of facts the history, purpose, and ultimate effect of the so-called "Statement by Government of Evidence", (Tr. 27-50) which was a 27-page document, handed to the trial judge in chambers on Friday, November 24th, three days before the hearing which was set for the following Monday, Nov. 27th (Tr. 198). What attention, if any, the trial judge gave to this document, petitioners cannot say, but the *undisputed fact* is that this highly prejudicial document was in his possession three days before the hearing; that it is obvious from his opinion (Tr. 236-242) that the petitioners were convicted, not by reason of either Count I or Count XII of the indictment, but by reason of the prejudice created in the mind of the trial judge through the alleged facts set forth in this statement of evidence.

The opinion of the trial judge (Tr. 236-242) reeks with error. Not once does it refer to the indictment. Not once does it refer to the statutes which petitioners were supposed to have violated. *There is not an allegation in the indictment as to how or when any of the alleged diversions took place, or as to who signed and endorsed the checks, or whether the diversions were paid over by cash* and if so who paid it.

The petitioners charge that the Government adopted this "side door method" of presenting their case for the sole purpose of evading the principle of law laid down by this Court in the *Norris* case, to which we shall soon refer.

Recognizing that there was in fact no offense charged in either Count I or Count XII of the indictment, and that strong measures were necessary to sustain the defective counts, someone (the author is unknown to the petitioners) prepared this so-called statement of evidence to supplement and sustain the indictment. The alleged facts, which were stated as conclusions, confused the trial judge. They were so stated as to conceal, rather than to reveal the facts. Many of the statements were expressions of half-truths, and some absolute falsities.

To read this "Statement by Government of Evidence", is to recognize that it was not conceived in good faith, because it ignores all the rules of evidence. It was handed to the trial judge in chambers in the absence of the petitioners and their counsel, three days before the hearing, to evade objections that might have been made to it by petitioners. No objection could be made during the hearing, for it was then too late.

What training or capacity the author had for recapitulating these facts, is not known. His identity is not known. No witness or expert took the stand to testify as to these conclusions or the basis on which they rested, or the books and records from which they came. No opportunity was afforded for cross examination; neither were petitioners confronted by any witnesses. Counsel for Government was thoroughly familiar with the *Norris* case, as is evidenced by their objections at the time of the hearing. (Tr. 203.) At that time, they insisted that the plea of *nolle contendere* operated as a bar to the introduction of any evidence which might show the truth. They had withheld copies of

this report, which were given to the petitioner, up until almost the last minute. Only ten or twelve days were given petitioners in which to cover and refute statements of facts covering an audit of six companies over a period of seven or eight years. To attempt to answer this so-called "Statement by Government of Evidence" was a Herculean task that would have taxed the mentality of an Einstein. It could not be done. Nevertheless, the petitioners did file a straightforward statement of the facts; (Tr. 50-157) went on the stand and swore to the truth of the facts stated therein. (Tr. 219, 220.) The Government did not deny such facts, neither did they cross examine the petitioners. The facts set forth in petitioners' statement must therefore be taken as true.

This Court has laid down a principle of law which the Government sought to evade in their statement of evidence. In the case of *U. S.* v. *Norris*, 281 U. S. 619, 74 L. Ed. 1076, this Court said:

> "In the face of an indictment good in form and substance, and of a plea thereto of *nolo contendere*, * * * the stipulation was ineffective to import an issue as to the sufficiency of the indictment, or an issue of fact upon the question of guilt or innocence. If the stipulation be regarded as adding particulars to the indictment, it must fall before the rule that nothing can be added to an indictment without the concurrence of the grand jury by which the bill was found. * * * If filed before plea and given effect, such a stipulation would oust the jurisdiction of the court, * * * After the plea, nothing is left but to render judgment, for the obvious reason that in the face of the plea no issue of fact exists, and none can be made while the plea remains of record."

We want to call this Court's attention to a few excerpts from the case of *Zeff* v. *Sanford*, 31 Fed. Supp. 736, wherein the court said:

> "But if a Court, before conviction or the entry of a plea of guilty, hears, in private and in the absence of the accused and without his knowledge or consent, a pre-

sentation of the case by the prosecuting attorney and others, and determines in such hearing, upon the sentence to be imposed, and thereafter, without advising the accused of such hearing and what took place therein * * * the sentence imposed, in the absence of express waiver, would be void."

"Even in such cases, however, any information not received from the accused himself or not given in his presence which might influence the judgment, should be called to his attention, without necessarily disclosing the sources of such information, so that he may be afforded an opportunity to object to its use and to rebut same. Even after conviction or plea of guilty, great care should be exercised to see that the accused understands what is taking place and has, before sentence is imposed, a fair and full opportunity to answer charges made against him."

Referring to the case of *Cooper* v. *United States*, 91 F. (2d) 195 (C. C. A. 5), the court said:

"The assignment of error runs only to permitting the summarization of them by the accountant. The trial court may in its discretion, allow a competent person who has examined extensive or complicated books or records to collate their contents and testify to the results, provided that a thorough cross examination be allowed, and that the books and records be at hand for use therein. * * * The accused was confronted by all the witnesses used against him. The accountant indeed gave no original evidence, but was rather a sort of interpreter to inform the court and jury and the accused what the books really said. Admitting his evidence is no error of practice or deprivation of a constitutional right."

Contrast this situation in this case with that of the petitioners who were faced with the so-called "Statement by Government of Evidence."

In the instant case, the "Statement by Government of Evidence" was received without even being signed, without even being identified, and without even being verified. We quote from the record (Tr. 222):

"The Court: Nobody signed it, I notice. It is not prepared to be signed by anybody. It says it is filed by the United States Government.

Mr. Valentine: I understand it is not necessary. We can proceed if you desire. We are assuming in this type of *nolo contendere* plea that it is not necessary. However, for the purpose of the record we will sign the statement.

The Court: You are giving me your professional word that you have made investigation of the statements and they are true and correct, that is what you are trying to do now. Of course heretofore it has not been certified by anybody as being true or correct or anything.

Mr. Valentine: We will sign it.

The Court: Your word is just as good in the record. I will take your word for that."

Upon this kind of a record, the petitioners were given long terms of imprisonment and subjected to a heavy fine.

On the day of the hearing, no witnesses were called by the Government. The trial judge was not afforded any opportunity of gathering light as to what he should or should not do with respect to punishing the petitioners. The record shows conclusively he was guided entirely by only one consideration, namely, the facts that had been presented to him in the "Statement by Government of Evidence" three days before the hearing. Note the record (Tr. 229):

"The Court: How much was paid into National from these three trusts outside of what they had a right to, a legal right to, the 15 per cent of the sales, do you remember what that was in round numbers?

Mr. Valentine: I am just taking time, I think I have the figure. $129,000 from the three common law trusts to National."

Here is a striking situation. The amount claimed is utterly incorrect. It includes many duplications, (Tr. 229) and it should be noted that the Government does not deny the contention of the petitioners that these loans to National

Securities Corporation, or "diversions" as termed by the Government, were used for the payment of the expenses of these various companies as indicated by the figures (Tr. 77-80). *All of this money could have been paid out by the companies direct for expenses over a period of almost eight years.*

The United States Attorney says (Tr. 41) that $129,000 was taken from the three trusts, namely, American Securities Trust, Mutual Trust Shares, and Cooperative Trust Shares. The record shows (Tr. 50) that there was no sale of shares in American Securities Trust after February 24th, 1933. This was clearly beyond the statute of limitations by more than six years. There were no sales of Mutual Trust Shares stock after December 30, 1935. (Tr. 51.) This was outside of the statute of limitations. Clearly, there is something wrong, because petitioners were evidently convicted of alleged crimes, some of which were evidently without the statute of limitations and some of which the Government claims were within the statute. *This is admitted by* Government. We quote from the record (Tr. 41):

> "For the period from 1932 to 1937 a total of, roughly, $129,000 was diverted from the three common law trusts to National Securities Corporation. * * *".

A perusal of the opinion of the trial judge (Tr. 236-242), leads to the inevitable conclusion that petitioners were sentenced, not for a violation of Section 338 of T. 18 and Section 77q (a) (2) of T. 15, but for an alleged "breach of trust" as outlined in this so-called "Statement by Government of Evidence".

Neither the indictment, nor the evidence introduced during the hearing, showed the existence of any trust indenture.

In this connection, we call this Court's attention to the case of *Todd* v. *U. S.*, 154 U. S. 278, 39 L. Ed. 983, wherein this Court said:

"It is axomatic that statutes creating and defining crimes cannot be extended by intendment, and that no act, however wrongful, can be punished under a statute unless clearly within its terms. 'There can be no constructive offenses, and before a man can be punished, his case must be plainly and unmistakably within the statute.' *United States* v. *Lacher*, 134 U. S. 624 (33: 1090)."

In the case of *People* v. *Brown*, 312 Ill. 63, 143 N. E. 440, it is said:

"A defendant charged in an indictment with a crime cannot be lawfully convicted, whether on a trial or on his plea of guilty, of any crime not charged in the indictment. His plea of guilty only confesses his guilt as charged in the indictment. If the indictment charges no criminal offense, he cannot lawfully be sentenced under that indictment. If it does charge a criminal offense he cannot be lawfully sentenced for any other offense not charged.'"

In the case of *United States* v. *Resnick*, 299 U. S. 207, 81 L. Ed. 127, appears this statement:

"Before one may be punished, it must appear his case is plainly within the statute; there are no constructive offenses."

We call this Court's attention to a very brief statement in the case of *Kirk DeJonge* v. *State of Oregon*, 299 U. S. 353, 81 L. Ed. 278, where, speaking of the indictment, the court said:

"Conviction upon a charge not made would be sheer denial of due process."

The United States Attorney said (Tr. 236):

"I might just make this further suggestion, Your Honor. The complaint of the Government is not that the portfolio values went down. *Your Honor has perhaps gathered that the complaint of the Government in this matter is the diversion of these funds contrary to the provisions of the trust indentures, is the statement made.*" (Italics ours.)

XII.

COUNT I OF THE INDICTMENT IS WHOLLY INSUFFICIENT IN THAT IT DOES NOT CHARGE AN OFFENSE, AND THE TRIAL JUDGE WAS WITHOUT JURISDICTION EITHER OF THE PERSON OR THE SUBJECT MATTER. UNDER SUCH CIRCUMSTANCES ANY ATTEMPTED SENTENCE CONSTITUTES A VIOLATION OF THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

Before discussing Count I we wish to call this court's attention to the case of *U. S.* v. *Hess*, 124 U. S. 483, 31 L. Ed. 516, which discusses the general principles of law governing indictments:

> "The general, and, with few exceptions, of which the present case is not one, the universal rule on this subject is, that all material facts and circumstances embraced in the definition of the offense must be stated, or the indictment will be defective. No essential element of the crime can be omitted without destroying the whole pleading. The omission cannot be supplied by intendment, or implication, and the charge must be made directly, and not inferentially or by way of recital."

Count I (Tr. 2-6) is founded upon Section 338 of Title 18 of the U. S. Code. We call this court's attention to two cases which discuss the elements of the crime defined in this statute. We quote from *Freeman* v. *United States*, 20 F. (2d) 748 (C. C. A. 3):

> "The basic element of the offense is the placing of a letter in the United States mail for the purpose of executing such a scheme. That is what makes it a federal offense. It is defined in the statute, must be alleged in the indictment, and must be proved. How? The Government says that it may be proved by the presumption arising from the postmark, 22 Corpus Juris 99, or, under the general rule that a postmark is prima facie evidence, that the envelope had been mailed, 21 R. C. L. 763; *United States* v. *Noelke*, (C. C.) 1 F. 426. That, con-

cedely, is the rule in civil cases; but it leaves unanswered the question * * * vital in criminal cases—who mailed it? The statute imputes the crime to 'whoever * * * shall * * * place or cause to be placed any letter in the mails, * * *' and the indictment here charged that the three defendants did that thing. That charge, we hold, must be proved by evidence. * * *

"No case has been called to our attention and none has been discovered by our independent research where conviction has been sustained when there is no evidence, direct or circumstantial, that the accused mailed the letter."

Not even the plea of *nolle contendere* establishes proof of who mailed the letter.

In the case of *Hass* v. *U. S.*, 93 F. (2) 427 (C. C. A. 8), the court said:

"The offense defined by this statute consists of two essential elements: (1) The existence of a scheme to defraud; and (2) the placing or causing to be placed in the post office of a letter, postal card, or other mailable matter for the purpose of executing or attempting to execute the scheme."

Count I recites that the fraud in the case at bar was the making, by the petitioners, of certain specific misrepresentations through the use of the United States mails, in inducing certain persons to become purchasers of shares in American Securities Trust, Mutual Trust Shares, and Cooperative Trust Shares. Petitioners contend that Count I fails to set out a scheme. The misrepresentations, if made, would merely represent the *carrying out* of the scheme. Even the trial judge recognized the deficiency of the indictment in this respect and so stated. (Tr. 208.)

"The Court: You don't set out the scheme, you set out a part of it.

Mr. Valentine: We set out the false representations and pretenses.

The Court: Yes, I know. That I presume is carrying out some scheme. What is the scheme you claim.

Mr. Valentine: That is the scheme to obtain the money under these false pretenses.

The Court: You say a scheme to defraud and to obtain the money and property. You don't say what the scheme was."

Not only is the scheme lacking, but there is an utter failure to show the use of the United States mails in the execution or attempted execution of a scheme to defraud. This Court will observe that Count I sets forth one letter. (Tr. 5, 6.) It is self-evident that this letter was not written in an attempt to induce the purchase of shares in any of these companies which is the offense charged in the indictment. Neither is there incorporated therein any one of the specific alleged misrepresentations, or, indeed, any representation of any kind or character. This letter is signed in type by Co-operative Trust Shares, not by either one of the petitioners. The letter recites the enclosure of an *unidentified* stock certificate and asks for a receipt.

We call this court's attention to the case of *Krause* v. *U. S.*, 29 F. (2d) 248 (C. C. A. 4), which seems to be in point, and in which the court said:

"The statute alone creates and defines the crime, and the government cannot, by suggestion, innuendo, averment, or charge, add to the provisions, nor can it widen the statute's application by adding to the letter or writing something not contained therein.

"This would seem to be too apparent to warrant argument, and the present case is a striking illustration of what would result if the view contended for by the government should prevail. In other words, the letter, writing or document would utterly be ignored, and the trial would turn upon what the government is pleased to term the purpose and intent of those alleged to have

violated the statute, not apparent upon the face of such letter or writing. A conviction of an accused would thus be had, not for an offense condemned by the statute, but for something that the government felt was intended, although not provided for therein."

The plea of *nolle contendere* cannot cure this lack of evidence of the use of the United States mails, or the lack of a clear, definite allegation of a scheme. The plea of *nolle contendere* admits only facts well pleaded in an indictment. *United States* v. *Lair*, 195 Fed. 47 (C. C. A. 8).

We also call this court's attention to the case of *Barnes* v. *U. S.*, 25 Fed. (2) 61, (C. C. A. 8), wherein the court said:

"This admission would not be controlling, if the matter mailed shows on its face that it would not be for the purpose of execution or of attempted execution of the scheme. It might appear that a letter was mailed before a scheme was devised, or was mailed after the scheme was fully accomplished, or that it was mailed in connection with an entirely different transaction, and in such cases the mailing could not be said to be for the purpose of executing the scheme. * * * but it must have some relation to and must be a step in the attempted execution of the scheme, *McLendon* v. *United States*, (C. C. A.) 2 F. (2) 660, 661; and be mailed with the intent to aid in its execution, *Brewer* v. *United States*, (C. C. A.) 290 F. 807, 808."

There is another defect in Count I. We wish to call attention to the fact that the alleged crime is the fraud practised in inducing persons to become purchasers of shares in *three* companies, American Securities Trust, Mutual Trust Shares and Cooperative Trust Shares. As has been stated, the only letter or writing in evidence in Count I is a letter signed by Cooperative Trust Shares. No letter or writing of any kind or character in connection with the other two companies, namely, American Securities Trust and Mutual Trust

Shares, is shown. Hence, petitioners contend that even were the one letter such a letter as to establish the use of the mails, it would represent evidence of only one-third of the purported charge. The plea of *nolle contendere* cannot supply this essential need of showing the use of the United States mail.

Again, with respect to American Securities Trust and Mutual Trust Shares, since in Count I no use of the mails is in evidence, the indictment fails to show that the purported offense in connection with these two companies is within the statute of limitations. This is a fatal defect.

Petitioners contend that Count I does not charge an offense. The question was raised in the lower court by motion to dismiss and quash. (Tr. 23-26.) The United States Attorney objected vigorously to any attack on the indictment, contending that the plea of *nolle contendere* precluded the raising of this question, and such objections were generally sustained by the trial judge. (Tr. 207, 218.) Petitioners contend that such a question can be raised at any time, since it is jurisdictional. The Circuit Court of Appeals was asked to review this matter (Tr. 243-245; 246-250; 267-268; 290-295, 297), and in affirming the judgment of the District Court, the Circuit Court of Appeals held Count I good, and indicated that petitioners were not justified in raising any question concerning the indictment after pleading to it. (Appendix.) This ruling is contrary to and in conflict with repeated rulings of this Honorable Court and of other circuits. There is no room for construction where no offense is charged. Every doubt must be resolved in favor of the defendants.

XIII.

COUNT XII OF THE INDICTMENT IS WHOLLY INSUFFICIENT IN THAT IT FAILS TO CHARGE AN OFFENSE UNDER THE LAWS OF THE UNITED STATES, AND THE TRIAL JUDGE IS WITHOUT JURISDICTION EITHER OF THE PERSON OR THE SUBJECT MATTER. ANY ATTEMPTED SENTENCE IS VOID AND OF NO EFFECT FOR THE REASON THAT THE SAME WOULD CONSTITUTE A VIOLATION OF THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

We wish to call this court's attention to certain matters in connection with Section 77q (a) (2) of Title 15 of the U. S. Code, upon which this Count is founded. (Appendix.)

Section 77q (a) (2) does not embrace within itself any *penalty clause*. It is an elementary principle of law that there can be no indictment for a violation of a statute which does not provide a penalty. In the case of *U. S.* v. *Seibert*, 2 F. (2d) 80, this court said:

> "No legislative act makes an act an offense, a crime, a misdemeanor, unless the statute so denominates it, or unless punishment for the act is expressly provided."

We also call this court's attention to the case of *Ex parte Grossman*, 267 U. S. 87, 69 Law Ed. 527, at p. 533, where it is said:

> *"The legislative authority of the Union must first make an act a crime, affix a punishment to it, and declare the court that shall have jurisdiction of the offense."* (Italics supplied.)

Section 77x of Title 15 of the U. S. Code is the penalty clause provided for the whole sub-chapter, and provides as follows:

> "Any person who *wilfully* violates any of the provisions of this sub-chapter, or the rules and regulations promulgated by the Commission under authority thereof, * * * shall upon conviction * * *." (Italics ours.)

We wish to suggest to this Court that the language of Section 77x is that "any person who *willfully* violates any of the provisions of this sub-chapter" shall be punished. This element of "willfulness" is not to be found in Section 77q (a) (2), the section which defines the alleged crime of petitioners. Courts are therefore confronted with the question of whether or not one may transfer or interpolate the word "willfully" by judicial construction so that it becomes a part of Section 77q (a) (2). If not, it should be held that the penalty clause does not apply, and therefore Section 77q (a) would be without effect, since it defines a crime for which no penalty is provided. We refer this Court to *U. S.* v. *Cameron*, 282 Fed. 684, wherein the court said:

> "* * * To hold that it is would manifestly require the court to interpolate into the statute by construction language that is not to be found there—something that under no circumstances may be indulged to sustain a criminal charge."

Enlarging further on this element of "willfullness" necessary to constitute an offense under this statute, we call this Court's attention to the fact that this element is not alleged in Count XII. The word "willfully" is not to be found in Count XII. Therefore, Count XII fails to charge an offense. This contention is supported by the case of *Asa Potter* v. *U. S.*, 155 U. S. 438, 39 L. Ed. 214, wherein Justice Brewer of the Supreme Court said:

> "The charge is of a *willful* violation. That is the language of the statute. Section 5208, Revised Statutes, makes it unlawful for any officer of a national bank to certify a check unless the drawer has on deposit at the time an equal amount of money. But this section carries with it no penalty against the wrong-doing officer. Section 13 of the Act of 1882 imposes the penalty and imposes it upon one 'who shall willfully violate,' (etc.) as well as upon one 'who shall resort to any device," etc., 'to evade the provisions of the Act;' * * * The word

'willful' is omitted from the description of offenses in the latter part of this section. Its presence in the first cannot be regarded as mere surplusage; it means something. It implies on the part of the officer knowledge and purpose to do wrong. Something more is required than an act of certification made in excess of the actual deposit, but in ignorance of that fact or without any purpose to evade or disobey the mandates of the law. The significance of the word 'willful' in criminal statutes has been considered by this court. *Felton* v. *U. S.*, 96 U. S. 699.

"And later, in the case of *Evans* v. *United States*, 153 U. S. 584, 594 (38:830, 834), there was this reference to the words 'wilfully misapplied':

" 'In fact, the gravamen of the offense consists in the evil design with which the misapplication is made, and a count which should omit the words 'wilfully', etc., and 'with intent to defraud', would be clearly bad."

The petitioners believe that Sub-section (2) of Section 77q (a) is so vague, indefinite, and uncertain in its terms as to be void and of no effect, and unconstitutional, for the reason that said provision of law fails to set up any standard or guide by which any person, not even the trial judge, could determine whether he was within or without the law, whether he was violating the law in either letter or spirit. In support of this proposition we call this Court's attention to the case of *Lanzetta* v. *New Jersey*, 306 U. S. 451, 83 Law Ed. 888, at page 890, where it is said:

"No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids. The applicable rule is stated in *Connally* v. *General Constr. Co.*, 269 U. S. 385, 391, 70 L. Ed. 322, 328, 46 S. Ct. 126: 'That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law.

> And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.' "

Count XII (Tr. 12-18) incorporates by reference all of Count I and that part of Counts II and III which set forth quarterly reports mailed to shareholders of Mutual Trust Shares and Cooperative Trust Shares. Count XII, in itself, sets out no letter or writing of any kind or character. We remind this Court, also, that since Counts I, II, and III, are founded on Section 338 of Title 18 of the U. S. Code, Count XII is thus made to embrace alleged offenses defined in two separate and distinct statutes. Objections urged to Count I are adopted by reference and also urged as to Count XII.

It has been held that an indictment founded on Section 77q (a) cannot be held sufficient, unless there is evidence of a "sale". This Court will note that there is no reference whatever to any specific overt act on the part of the defendants, or to any "sale".

As suggested in our discussion of Count I, the complaint against petitioners was alleged fraud in connection with *three* companies. Since Count XII evidences no use of the United States mails except as it incorporates the letter of Cooperative Trust Shares in Count I, and the letters of Mutual Trust Shares and Cooperative Trust Shares in Counts II and III, here again, we have no use of the mails whatever shown in connection with American Securities Trust, and consequently, one-third of the purported charge absolutely unsupported.

As stated in our discussion of Count I, petitioners attacked the sufficiency of the indictment in the lower court, objections to this action being sustained by the trial judge. (Tr. 207, 218.) The trial court was obviously in error in overruling the motion of defendants in which they raised the

question of the sufficiency of the indictment. (Tr. 217.) The circuit court was equally in error in affirming the judgment of conviction. The matter was put before the Circuit Court of Appeals (Tr. 259-268; 290-298). We quote from the opinion of the Circuit Court of Appeals (Appendix):

> "As the sentence of imprisonment and fine imposed under the first count of the indictment did not equal the maximum penalty fixed by the applicable statute, and the imprisonment under the twelfth count runs concurrently with that under the first count, there is no occasion to discuss the sufficiency of the twelfth count."

This statement is erroneous as the trial judge did in fact attempt to impose upon petitioner Dillon the maximum sentence under the first count.

Was it the duty of the Circuit Court of Appeals to affirmatively declare that Count XII charged an offense? They say "We think it also stated an offense."

XIV.

WHERE UNCONTRADICTED EVIDEINCE SHOWS THAT SECTION 77c OF T. 15 OF THE U. S. CODE EXPRESSLY EXEMPTS ALL COMPANIES NAMED IN INDICTMENT, NAMELY AMERICAN SECURITIES TRUST, MUTUAL TRUST SHARES, AND COOPERATIVE TRUST SHARES, CONVICTION FOR AN ALLEGED VIOLATION OF SECTION 77q (a) (2) OF T. 15 CANNOT BE SUSTAINED, AND SUCH CONVICTION UNDER THIS STATUTE WOULD BE A VIOLATION OF THE CONSTITUTIONAL PROHIBITION AGAINST *EX POST FACTO* LAWS.

This is a question which has never been passed upon by this Honorable Court.

Section 77c of T. 15 of the U. S. Code (Appendix) provides an exception covering securities bona fide offered to the public sixty days prior to the time the Securities Act of 1933 became effective on July 27th, 1933.

The trial judge declined to consider any evidence on this point, the record showing that the defendants made the following offer (Tr. 218):

> "Mr. Comfort: They offer to prove also that all shares in all the trusts named above were offered bona fide to the public before the S. E. C. became effective July 27, 1933."

The United States Attorney made the following objection to this offer (Tr. 218):

> "The Government objects to the offer for the reason that after a plea of *nolo contendere* has been entered that nothing remains for the court to do but to render judgment. The offer just stated is an attempt to attack the sufficiency of the indictment and for that reason it is immaterial and incompetent."

The trial judge sustained the objection as follows (Tr. 218):

> "Well, it is an attempt to change the statements made in the indictment. Sustained. (Defendants except.)"

Obviously, both the United States Attorney and the trial judge wholly misunderstood the nature of this offer. The objection of the U. S. Attorney had no application to the offer as it had nothing to do with the sufficiency or insufficiency of the indictment. Neither did the trial judge understand the question, as the objection was sustained on the same ground. The evidence, of course, would go to the sufficiency of the indictment in the sense that if these three companies were not subject to the statute, then the court did not in fact have jurisdiction. Neither would it be competent for the court to impose sentence and judgment on petitioners.

The record before the court was clear as to these facts. The statement prepared by petitioner Crowley (Tr. 150), which he identified on the witness stand (Tr. 219) was re-

ceived without objection by the Government and without cross examination. We quote from petitioner Crowley's statement:

> "As a matter of fact he was advised by Counsel that he could not be guilty of any violations under the Securities Act of 1933, and as amended in 1934, because as this counsel had advised him, all of these trusts had been organized and their shares authorized for sale more than sixty days before the Federal Securities Act became effective."

The refusal of the trial judge to consider this evidence was unreasonable and arbitrary, and constituted an abuse of discretion being clearly in violation of the due process clause of the Fifth Amendment to the Constitution of the United States.

We call this Court's attention to Section 77q, Sub. Sec. (c), reading as follows:

> "(c) The exemptions provided in Section 77c shall not apply to the provisions of this section."

The contention that Sub-section (c) of Section 77q removes this exemption seems untenable, because the original exemption exempts the whole title or sub-chapter, and therefore, it would seem to follow that since the whole title or subchapter is exempted, any exception which attempted to remove a single provision of the sub-chapter from this exemption would be of no avail. Again, very clearly, to give effect to this Subsection c of Section 77q would violate the constitutional prohibition against an *ex post facto* law, as provided for in Sub-section 9 of Article I of the Federal Constitution.

It is impossible from a reading of the opinion of the Circuit Court of Appeals to determine whether or not such court held Count XII a good and sufficient indictment. The opinion did not pass on this, as well as other questions raised with respect to Count XII, merely saying "We think it also stated an offense."

Unquestionably, even under a plea of *nolle contendere*, the question of the sufficiency of the indictment may be raised. Our opinion is that the plea of *nolle contendere* did not bar this evidence, and that the court should have held that the companies involved were not within the Twelfth Count.

There can be no dispute concerning this fact. The record is clear that the shares of American Securities Trust Shares, Mutual Trust Shares and Cooperative Trust Shares were all bona fide offered publicly more than sixty days before the law became effective July 27, 1933. The shares of American Securities Trust were offered bona file on or about October 7th, 1931 (Tr. 50). The shares of Mutual Trust Shares were bona fide offered on or about November 1, 1932 (Tr. 51), and the shares of Cooperative Trust Shares on or about April 15, 1933 (Tr. 51).

XV.

A STATUTE ATTEMPTING TO CONFER JURISDICTION ON THE DISTRICT COURTS OF THE UNITED STATES OF OFFENSES AND VIOLATIONS UNDER 77a to 77aa OF TITLE 15 OF THE UNITED STATES CODE AND UNDER THE RULES AND REGULATIONS PROMULGATED BY THE COMMISSION IN RESPECT THERETO, IS VOID AND OF NO EFFECT AS BEING IN CONTROVENTION OF SECTION 2, ARTICLE III OF THE CONSTITUTION OF THE UNITED STATES AND THE SIXTH AMENDMENT THERETO.

The petitioners contend that the court had no jurisdiction of the offense alleged in Count XII, for the reason that the District Court has no jurisdiction except as it is expressly conferred, and such jurisdiction of offenses arising under Count XII has not been conferred. We call attention to Section 77v, which attempts to confer jurisdiction, and which provides:

> "(a) The district courts of the United States * * * shall have jurisdiction of offenses and violations

> under this title and under the rules and regulations promulgated by the Commission in respect thereto, * * *."

Counsel for the defendants feel that the above provision is far too broad, and violates the constitutional provisions relating to territorial jurisdiction, in so far as criminal cases are concerned. Section 2 of Article III of the Constitution provides:

> "The trial of all crimes, except in cases of impeachment shall be by jury; and such trial shall be held in the state where the said crimes shall have been committed; * * *."

It is further provided, in the Sixth Amendment to the Constitution of the United States, as follows:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, * * *."

It is not within the power of Congress to confer jurisdiction on the district courts of the United States, except subject to Constitutional limitations, and it is not within the power of this court to read into the language of this statute that such jurisdiction is limited to the territorial jurisdiction of the district courts of the United States. We call attention to an opinion of the Supreme Court of the United States found in *Robertson* v. *Railroad Labor Board*, 268 U. S. 619, 69 L. Ed. 1119, in which case it was held that the term "United States District Court" did not mean such court had unlimited jurisdiction, but meant any such court "of competent jurisdiction". This was in connection with a civil proceeding to compel the attendance of a witness. However, in connection with a criminal statute in attempting to confer jurisdiction over criminal offenses, it must affirmatively appear in the statute

that such jurisdiction is limited in accordance with Constitutional limitations. Justice Sutherland, in *Norton* v. *Larney*, 266 U. S. 511, 60 L. Ed. 413, says:

> "It is quite true that jurisdiction of a federal court must affirmatively and distinctly appear and cannot be helped by presumption or by argumentative inferences drawn from the pleadings."

The same principle is applicable to this statute. It is only by presumptions or by inferences that the effect of the statute can be limited in a territorial sense, and since the statute as it stands is in conflict with the Constitution, it must be void and of no effect. Jurisdiction cannot be conferred which is in conflict or which attempts to override Constitutional limitations. Jurisdiction cannot be conferred for violation of rules and regulations of the Commission. We call this court's attention to the case of *U. S.* v. *Eaton*, 144 U. S. 677, 36 L. Ed. 591, wherein the Supreme Court, speaking of departmental regulations, said:

> "It is a principle of criminal law that an offense which may be the subject of criminal procedure is an act committed or omitted 'in violation of a public law, either forbidding or commanding it'. 4 Am. & Eng. Enc. Law, 642."

Panama Refining Co. et al., v. *A. D. Ryan, et al.*, 293 U. S., 388, 79 L. Ed. 446.

A. L. A. Schechter Poultry Corp., et al., v. *United States*, 295 U. S., 495, 79 L. Ed. 1570.

XVI.

IN ALL CRIMINAL PROSECUTIONS AND NOT WITHSTANDING A PLEA OF *NOLLE CONTENDERE*, DEFENDANTS ARE ENTITLED TO A FAIR TRIAL.

The statement in the opinion of the Circuit Court of Appeals that the plea of *nolle contendere* precluded a trial, is a misstatement of law. All elements of the hearing are con-

ducted as usual and subject to all the known rules of procedure which have heretofore been applied. The only limitation is that the element of guilt is settled insofar as the averments of the indictment are properly pleaded.

We call attention to the case of *Hocking Valley Ry. Co.* v. *U. S.*, 210 Fed. 735, (C. C. A. 6), wherein the court said:

> "* * * It seems to be the settled rule that, even after explicit plea of guilty, defendant may urge, in the reviewing court, such an objection * * *; and we are satisfied that the plea of *nolle contendere* should not be construed as a waiver of a right which the plea of guilty does not waive (*U. S.* v. *Hartwell*, 26 Fed. Cas. 196, 201, 3 Cliff. 221; *Com.* v. *Horton*, 9 Pick (26 Mass.) 206; *Com.* v. *Grey*, 2 Gray (68 Mass.) 501, 61 Am. Dec. 476). We must therefore examine on their merits the questions presented."

The record in the case at bar shows conclusively that defendants did not have a fair trial, in that

(a) The trial judge assumed, and the United States Attorney insisted, that the plea of *nolle contendere* cut off all defenses of the defendants except the right to be present when sentence was imposed (Tr. 204-207, 217, 218).

(b) The trial judge, notwithstanding a plea of *nolle contendere* and the rule announced in the case of *United States* v. *Norris*, accepted from the United States Attorney, in chambers and in the absence of petitioners and their counsel, a 27-page document, designated "Statement by Government of Evidence" (Tr. 27-50), which unsigned, unidentified and unverified document, became the basis upon which the petitioners were sentenced to long terms of imprisonment. This so-called "Statement by Government of Evidence" introduced many matters having absolutely no connection with the charge in the case at bar. These foreign matters were received by the trial judge and formed the basis of many of the thoughts expressed in his opinion, all of which were highly prejudicial and detrimental to the petitioner.

(c) The opinion of the trial judge (Tr. 236-242) shows conclusively an utter misconception of both the law and the facts, particularly on the following matters, to-wit:

1. The trial judge says in his opinion that petitioner Dillon took out $100,000. (Tr. 239.) *There is not one word in the indictment or in the Government's statement of evidence, or in any other part of the record sustaining such allegation.* There is not one word of evidence that petitioner Dillon, individually, ever took out five cents exclusive of trustee fees.

2. The trial judge speaks of hundreds of thousands of dollars being invested (Tr. 240), and utterly fails to make any mention of the fact that thousands and thousands of dollars were repaid to shareholders in the redemption of certificates and the payment of dividends.

(d) The trial judge accepted the Statement by Government of Evidence from the United States Attorney and also accepted the theory of the United States Attorney that the violation of law on the part of petitioners was a violation of a trust indenture (Tr. 236), and imposed sentence on that basis rather than on the offense charged in the indictment. This was done in spite of the fact that no trust indenture was mentioned in the indictment or introduced in evidence.

(e) So far as the record is concerned, petitioners were sentenced for alleged fraud in the sale of shares of American Securities Trust and Mutual Trust Shares, notwithstanding the record shows without contradiction that no shares of stock in either of these companies had been sold within three years prior to the return of the indictment, and that consequently these companies were without the statute of limitations.

(f) Petitioners were convicted and sentenced in spite of the fact that the government wholly failed to sustain Count I, in that no letter or writing of any kind appears in Count I with respect to American Securities Trust and Mutual Trust Shares. There was a total failure of proof, notwithstanding the plea of *nolle contendere,* the plea not being such as to supply letters or writings where the same were not set forth. The same facts are true of Count XII with respect to American

Securities Trust Shares, the result being a failure of proof as to both Counts.

(g) Evidence of good character on the part of petitioners was used by the trial judge as a reason for imposing heavier sentences. (Tr. 240.)

REASONS RELIED ON FOR ALLOWANCE OF WRIT.

1. That the Circuit Court of Appeals has rendered a decision in conflict with the decisions of other circuit courts of appeal on the same matter.

2. That the Circuit Court of Appeals has decided an important question of federal law which has not been, but should be settled by this Court.

3. That the Circuit Court of Appeals has decided a federal question in a way probably in conflict with applicable decisions of this Court.

4. That the Circuit Court of Appeals has so far departed from the accepted and usual course of judicial proceedings and has so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

Questions not heretofore decided by this Court arise (a) in connection with the plea of *nolle contendere* in the matter of purported violation of certain federal statutes; (b) in connection with new questions not heretofore decided relating to the question of whether or not Congress has conferred or can confer jurisdiction on district courts of the United States for offenses violating criminal provisions of the Securities Act of 1933 as amended, and whether such Court may entertain jurisdiction for violation of rules and regulations not yet promulgated and when the same would constitute a delegation of the legislative power of Congress, in violation of the Federal Constitution; (c) in connection

with a question of the constitutionality of Section 77q (a) of T. 15 of the U. S. C.

This Court's power of supervision should be exercised in connection with the custom of modifying, altering, amending and adding to the sentence of the court in preparing the written judgment to be signed by the trial judge and entered in the record of the Clerk's office, especially when such altered entries are prepared in the absence of defendants and their counsel.

Other constitutional questions arise with respect to due process as related to a fair trial under a plea of *nolle contendere.*

JURISDICTION.

The United States Circuit Court of Appeals for the Eighth Circuit made its order of mandate herein August 5, 1940.

Within thirty days from its final judgment, on August 5, 1940, the jurisdiction of this court is invoked pursuant to provisions of Title 28, U. S. Code, Section 347, subdivision "A", Section 240 (A) of the Judicial Code, as amended, and Rule 38 of the Revised Rules (1939) of the Supreme Court of the United States.

The reasons stated in this Petition are believed to constitute good grounds for invoking the jurisdiction of this Court.

Wherefore, because of the gravity and importance of the questions involved, your petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this court, directed to the judges of the United States Circuit Court of Appeals for the Eighth Circuit, commanding them, and each of them to certify and send to this court on a day certain, to be therein designated, a full and complete transcript of the records and proceedings, with the affidavits filed

in said Circuit Court of Appeals in the case lately pending there, entitled Sidney J. Dillon and Lewis E. Crowley, Appellants, v. United States of America, Appellee, Nos. 11645 and 11647, to the end that the decision and judgment of the said Circuit Court of Appeals for the Eighth Circuit may be reviewed as provided by law, and that your petitioners may have such other relief or remedy in the premises as this Court may deem appropriate and in conformity with law, and that the decision and judgment of the said Circuit Court of Appeals of the Eighth Circuit and the U. S. District Court in and for the Southern District of Iowa, Central Division, in said case and every part thereof, may be reversed by this Honorable Court.

And your petitioners now present as an exhibit to this petition, a certified copy of the entire transcript of record before the Circuit Court of Appeals, to which court they pray the writ of certiorari may be directed.

Dated, Des Moines, Iowa,
September 5, 1940.

EDWARD L. O'CONNOR,
FRANK J. COMFORT,
WALTER F. MALEY,
Attorneys for Petitioners.

CERTIFICATE OF COUNSEL.

I hereby certify that I am one of counsel for petitioners in the above-entitled cause and that in my judgment the foregoing petition for a writ of certiorari is well founded in point of law as well as in fact and that said petition for a writ of certiorari is not interposed for delay.

Dated, Des Moines, Iowa,
September 5, 1940.

EDWARD L. O'CONNOR,
Attorney for Petitioners.

APPENDIX.

UNITED STATES CIRCUIT COURT OF APPEALS.
EIGHTH CIRCUIT.

No. 11645. May Term, A. D. 1940.

Sidney J. Dillon, *Appellant*,
vs.
United States of America, *Appellee*.
Appeal from the District Court of the United States for the Southern District of Iowa.

No. 11647. May Term, A. D. 1940.

Lewis E. Crowley, *Appellant*,
vs.
United States of America, *Appellee*.
Appeal from the District Court of the United States for the Southern District of Iowa.

[July 16, 1940.]

Mr. Frank J. Comfort for Appellant Lewis E. Crowley, and Mr. Walter F. Maley for Appellant Sidney J. Dillon.

Mr. Cloid I. Level, Assistant United States Attorney (Mr. Hugh B. McCoy, United States Attorney, and Mr. Wm. R. Sheridan, Assistant United States Attorney, were with him on the brief) for Appellee.

Before WOODROUGH and THOMAS, Circuit Judges, and BELL, District Judge.

WOODROUGH, Circuit Judge, delivered the opinion of the court.

Sidney J. Dillon and Lewis E. Crowley were indicted upon ten counts (1-10) for violation of 18 U.S.C.A. 338 (the mail fraud statute) and upon two counts (11 and 12) for violation

of 15 U.S.C.A. 77-q (a) (2) (the Securities Act of 1933 as amended). They each plead *nolo contendere* to two counts (one and twelve) and were thereupon sentenced: Dillon to five years imprisonment on each of the two counts, to run concurrently, and a thousand dollar fine; and Crowley to three years imprisonment on each of the counts, to run concurrently, and a thousand dollar fine. They have prosecuted separate appeals from the final judgments which have been heard together upon the same record.

It appears from the record that after the pleas of *nolo contendere* were entered by the defendants the court passed the cause for sentence to a date twenty-eight days later. On the appointed day, the defendants appeared and filed a motion to dismiss and quash the indictment and for discharge of the defendants, and an amendment thereto. The District Attorney protested that in view of the plea of *nolo contendere* the motion could not then be made, but the court expressed the opinion that the sufficiency of the indictment could be inquired into at any time, and the motion and amendment having been argued by counsel, the court overruled the same and directed that the record show that the motion and the amendment were ordered to be argued before taking up the matter of the pleas of *nolo contendere*, and that "the court being advised", had then made its ruling and allowed exception.

The record as to the court's hearing and disposition of the motion and the amendment was doubtless kept clear in this manner to prevent our confusing in any way the court's action on the motion with its action respecting the pronouncement of sentence on the defendants' pleas of *nolo contendere*. The court had assigned the cause at that time only for pronouncement of sentence on the pleas, but the defendants had each filed typewritten statements which were treated and considered by the court as their statements of cause why

judgment should not be pronounced against them, and in addition they offered testimony in their behalf. The District Attorney also had filed a typewritten statement advising the court of the testimony which he believed was available to the government to sustain the charges of the indictment. In their respective statements the defendants had also given their version of the matters covered by the statement presented by the District Attorney. The defendants made no request to withdraw their pleas of *nolo contendere*. Their counsel stated "the Court may make any inquiry into the facts that may assist him, and we are merely offering it [the proffered testimony (1)] to aid the court in determining these legal questions that will come up to be determined". "We don't question the effect of the plea." The court therefore made its position plain on the record that it would not hear evidence on whether the facts warranted the indictment and that it would not "go behind the indictment". But the court stated, "I don't like to arbitrarily say the gentlemen can not make a record on their position * * *", and it appointed an official reporter to make up a record of the proceedings which were had before it. They consisted of offers of proof made by defendants, arguments of counsel, colloquy and discussion between the court and counsel, questions propounded to defendants and answered by them, and evidence of the good character of the defendants. The court clearly indicated by its rulings and statements that it would not hear evidence to contradict the indictment or to show its insufficiency, but would "take the evidence" as indicated by the record for the purpose of aiding in passing sentence. Counsel for defendants also made eloquent pleas for leniency for their clients, conceding as to defendants that "they did some things they ought not to do", but urging that they stood before the court "as good citizens, engaged in honorable pursuits in life, unfortunate in the situation in which they find themselves", and that they did

Footnote (1) Interpolated.

not come within the class that needed to be isolated for the benefit of the public. The court, in passing sentence, expressed a contrary view of the nature of the offenses charged against the defendants, admitted by their plea, and explained by the statements considered during the proceedings. The formal journal entry of the judgment of sentence appears in the record duly signed by the judge.

On this appeal the substance of the points argued for reversal is (1) that the indictment fails to charge an offense; (2) that the court considered incompetent evidence and failed to consider competent evidence tendered by defendants; (3) that there was improper joinder of parties and of offenses; (4) that the judgment entered does not conform to the oral pronouncement of the court; (5) that there was unjust discrimination between the defendants in the different penalties imposed; (6) that the punishment was cruel and excessive; (7) that the court was confused as to the law and facts; (8) that the defendants did not have a fair trial.

OPINION.

(1) The first count of the indictment plainly and sufficiently charges both defendants with the commission within the period of the statute of limitations of the offense denounced by the mail fraud statute, 18 U. S. C. A. 338. A copy omitting the formal parts is appended,(2) and no good

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Footnote (2).

"Count One.

That prior to the several acts of using, and causing to be used, the United States mails, hereinafter set forth, Sidney J. Dillon and Lewis E. Crowley, hereinafter called 'defendants', at Des Moines, County of Polk and State of Iowa, in the Central Division of the Southern District of Iowa, and within the jurisdiction of this Court, having devised and intended to devise a scheme and artifice to defraud and to obtain money and property by means of false and fraudulent pretenses, representations and promises from numerous and sundry persons, too numerous to mention herein, hereinafter called investors, including all persons who could or might be induced by means of said false and fraudulent pretenses, representations and promises, hereinafter mentioned, to become purchasers of shares in investment trusts operated and controlled by the said defendants, to-wit: American Securities Trust, Mutual Trust Shares, and Cooperative Trust Shares;

purpose could be served by discussion of the attacks that were made upon it after the defendants had pleaded to it. As the sentence of imprisonment and fine imposed under the first count of the indictment did not equal the maximum penalty fixed by the applicable statute, and the imprisonment under the twelfth count runs concurrently with that under the first count, there is no occasion to discuss the sufficiency of the twelfth count. *Miller* v. *U. S.* 295 F. 602. We think it also stated an offense.

That as a part of said scheme and artifice to defraud and to obtain money and property my means of false and fraudulent pretenses, representations and promises, the defendants under their own names respectively, and under the names of the American Securities Trust, Mutual Trust Shares, Cooperative Trust Shares, National Securities Corporation, and the Mid West Discount Corporation, by means of correspondence and circular letters and by the said defendants directly through personal solicitation and through personal solicitation by salesmen and agents, would and did make and cause to be made false and fraudulent pretenses, representations and promises, as follows, to-wit:

(A) That as trustees of each of said Trusts so operated by said defendants, they would invest the capital of each of said Trusts only in securities, bonds, stocks, debentures, and obligations of public or private corporations, which had their securities listed on what is known as the New York Stock Exchange, or in Government bonds, whereas in truth and in fact, as the said defendants, and each of them, then and there well knew, the said defendants as Trustees of each of said Trusts would not invest the capital of each of said Trusts only in securities, bonds, stocks, debentures and obligations of public or private corporations, which had their securities listed on what is known as the New York Stock Exchange, or in Government bonds, but on the contrary the said Trustees would and did divert a substantial portion of the capital of said Trusts to the use and benefit of the said defendants, and to other individuals to these Grand Jurors unknown, and to corporations and trusts dominated and controlled by the said defendants.

(B) That any returns to the investors by way of dividends or earnings would be paid solely from the earnings and income of the investments made by the Trusts and from the profits from the purchases and sale of securities owned by said Trusts, whereas in truth and in fact, as the said defendants, and each of them then and there well knew, the said returns to the investors would not be paid solely from earnings and income of the investments made by the Trusts and from the profits from the purchase and sale of securities owned by said Trusts, but on the contrary pretended and fictitious returns were paid in substantial amounts from capital.

(C) That the shares of said Trusts would be sold and issued only upon the payment of cash to the Trustees of said Trusts, whereas in truth and in fact as the said defendants, and each of them then and there well knew, the shares of said Trusts would not be sold and issued only upon the payment of cash to the Trustees of said Trusts,

(2) The extent of the sentence to be imposed upon the defendants was within the discretion of the trial court. It is settled that the pleas of *nolo contendere* were confessions of guilt for the purpose of the case, and sentence of both imprisonment and fine could be imposed upon such plea. *Hudson* v. *United States,* 272 U. S. 451. The court accorded the defendants full opportunity to give their version of all the matters involved in the charges against them, and they availed themselves of the opportunity. The court properly refused to "go behind the indictment", or to turn its proceedings relative to the imposition of sentence into a trial of the case. It heard everything proffered that tended to aid in exercising its discretion, and the attacks now made upon the procedure by which it became advised as to the sentence proper to be imposed are without merit.

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but on the contrary said Trustees authorized and acquiesced in the sale and issuance of such shares without cash being paid therefor to the Trustees of said Trusts.

(D) That the money and property secured from the investors in each of said Trusts would be invested and held intact for the benefit of the investors in each respective Trust, whereas in truth and in fact, as the said defendants and each of them then and there well knew, the money and property secured from the investors in each of said Trusts would not be invested and held intact for the benefit of the investors in each respective Trust, but on the contrary the defendants, and each of them, would and did divert to their own uses and benefits, to the use and benefit of other persons, and to the use and benefit of corporations and trusts dominated and controlled by the said defendants, certain of the funds and assets of each of said Trusts.

(E) That the expense of managing said Trusts would be limited solely to annual remuneration to be paid to said defendants as Trustees of each of said Trusts at a rate not to exceed one-half of one percent quarterly of the value of the assets of said Trusts; whereas in truth and in fact, as the said defendants and each of them then and there well knew, the expense of managing said Trusts would not be limited solely to annual remuneration to be paid to said defendants as Trustees of each of said Trusts at a rate not to exceed one-half of one per cent quarterly of the value of the assets of the said Trusts, but on the contrary by subterfuge the said defendants would and did pay to themselves an additional annual remuneration for the management of said Trusts, in an amount several times greater than one-half of one per cent quarterly of the value of the assets of said Trusts.

(F) That these defendants as Trustees of said Trusts would periodically publish and distribute to the investors in each of said Trusts details and information concerning the portfolios of said re-

(3) The fact that a charge of violation of the mail fraud statute was joined in the same indictment, but in different counts, with a charge of violation of the Securities Act, did not render the indictment defective, and certainly such fact presents no ground to reverse the judgments entered upon pleas of *nolo contendere*. The two officers of the common law trusts who co-operated in the commission of the offenses were properly joined as defendants in the same indictment.

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spective Trusts designed to apprise said investors of important details of the respective portfolios of said Trusts, and of the status and condition of said respective Trusts; whereas in truth and in fact, as the said defendants and each of them then and there well knew, they would not periodically publish and distribute to the investors in each of said Trusts details and information concerning the portfolios of said respective Trusts designed to apprise said investors of important details of the respective portfolios of said Trusts, and of the status and condition of said respective Trusts, but on the contrary the said defendants would and did periodically publish and distribute to the said investors information which was and could be of no value to said investors.

(G) That the Trusts were operating under the laws of the State of Iowa and by reason thereof were complying with the laws and regulations of the State of Iowa relating to the sale of Securities, whereas in truth and in fact, as the said defendants and each of them then and there well knew, the Trusts were not complying and would not comply with the laws of the State of Iowa, but on the contrary the defendants as Trustees of said Trusts falsely represented to the Securities Commission of the State of Iowa the condition of the Trusts.

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further find and present that the said defendants and each of them, by means of said scheme and artifice to defraud and for obtaining money and property by means of false and fraudulent pretenses, representations and promises, hereinabove set forth, did induce the said investors to trade and exchange their money and property for the shares of said Trusts.

And the Grand Jurors further present and charge that they, the said defendants, so having devised and intending to devise the aforesaid scheme for the obtaining of money and property by means of false and fraudulent pretenses, representations and promises, for the purpose of executing said scheme and in attempting so to do, on or about the 22nd day of April, A. D. 1936, at the City of Des Moines, County of Polk and State of Iowa, in the Central Division of the Southern District of Iowa, and within the jurisdiction of this Court, did knowingly, unlawfully, wilfully and feloniously place and cause to be placed in an authorized depository for mail matter, to-wit, a Post Office in the City of Des Moines, Iowa, to be sent and delivered by the Post Office establishment of the United States a certain writing, to-wit, a letter dated April 22, 1936, signed by the Cooperative Trust Shares, enclosed in a postpaid envelope addressed to Mrs. Etta L. Heefner, 654—46th St., Des Moines, Iowa, which said letter is in words and figures as follows, to-wit:

(4) In its oral pronouncement of sentence, the court ordered that Mr. Dillon be committed for a period of five years and fined a thousand dollars on each count, running concurrently (referring to the two counts to which he had plead *nolo contendere*). The judge thereupon, on the same day, made and signed the formal judgment entry. It omits any fine on the twelfth count and specifies an institution of the penitentiary type, to be designated by the Attorney General, as the place of imprisonment, and is entirely regular in form. This record so made presents no irregularity that would justify this court in remanding the case to have the District Court re-sentence the defendant, and no prejudice can be occasioned the defendant by the form of judgment as it appears in the record. The oral pronouncement as to Mr. Crowley was that he be committed for three years on each count and a thousand dollar fine. The formal judgment entry as to Mr. Crowley included the fine as part of the punishment under the first count and specified an institution of the penitentiary type, to be designated by the Attorney General, as

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Sidney J. Dillon, Pres.
L. E. Crowley, Vice-Pres.
O. P. Lightfoot, Vice-Pres.
H. M. Gustafson, Sec-Treas.

Cooperative Trust Shares
703 Register and Tribune Building—Des Moines, Iowa.

April 22, 1936.

Mrs. Etta L. Heefner,
654—46th St.,
Des Moines, Iowa.

Dear Mrs. Heefner:

We beg to enclose herewith the following securities, receipt of which please acknowledge on enclosed blank.

766 shares Certificate No. 458 $1.14 $873.24

Very truly yours,
COOPERATIVE TRUST SHARES.

EB

That at the time of placing and causing to be placed said letter in the Post Office of the United States as aforesaid, they, the said defendants, and each of them, then and there well knew that said letter was for the purpose of executing said scheme and artifice and in attempting so to do;

Contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America."

the place of imprisonment. There is no irregularity to justify a remand to make correction, and no prejudice. Much less is there any ground for reversal of either judgment.

Proper commitments will doubtless issue upon the sentences as they appear of record.

(5) The fact that one defendant was given a heavier sentence than the other affords no ground of complaint for either.

(6) Neither of the sentences was cruel and excessive.

(7) We find nothing in the remarks made by the court in the course of imposing sentence to justify criticism. The court expressed severe condemnation of the breaches of trust committed by the defendants before him and such was his duty.

(8) The appellants have no standing, in view of their pleas of *nolo contendere,* to argue that they did not have a fair trial. By entering their pleas they precluded a trial.

Affirmed.

Section 338 of Title 18 of U. S. C.

"Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, * * * shall, for the purpose of executing such scheme or artifice or attempting so to do, place, or cause to be placed, any letter, postal card, package, writing, circular, pamphlet, or advertisement, whether addressed to any person residing within or outside the United States, in any post office, or station thereof, or street or other letter box of the United States, or authorized depository for mail matter, to be sent or delivered by the post office establishment of the United States, or shall take or receive any such therefrom, whether mailed within or without the United States, or shall knowingly cause to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such letter, postal card, package, writing, circular, pamphlet, or advertisement, shall be fined not more than $1,000, or imprisoned not more than five years, or both."

Sec. 77q (a) (2) of Title 15 of the U. S. C.

"Sec. 77-q. Fraudulent interstate transactions.

"(a) It shall be unlawful for any person in the sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly—

"(1) to employ any device, scheme, or artifice to defraud, or

"(2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or * * *"

Section 77x of Title 15 of the U. S. C.

"Sec. 77x. Penalties.

"Any person who willfully violates any of the provisions of this sub-chapter, or the rules and regulations

promulgated by the Commission under authority thereof, or any person who willfully, in a registration statement filed under this sub-chapter, makes any untrue statement of a material fact or omits to state any material fact required to be stated therein or necessary to make the statements therein not misleading, shall upon conviction be fined not more than $5,000 or imprisoned not more than five years, or both."

Section 77v of Title 15 of the U. S. C.

"Sec. 77v. Jurisdiction of offenses and suits.

"(a) The district courts of the United States, the United States courts of any Territory, and the district court of the United States for the District of Columbia shall have jurisdiction of offenses and violations under this title and under the rules and regulations promulgated by the Commission in respect thereto, * * *."

Section 77c of Title 15 of the U. S. C.

"Sec. 77c. Exempted Securities.

"(a) Except as hereinafter expressly provided, the provisions of this sub-chapter shall not apply to any of the following classes of securities:

"(1) Any security which, prior to or within sixty days after the enactment of this title, has been sold or disposed of by the issuer or bona fide offered to the public, but this exemption shall not apply to any new offering of any such security by an issuer or underwriter subsequent to such sixty days."

Section 582 of T. 18 of U. S. C.

"Sec. 582. Offenses not capital. No person shall be prosecuted, tried, or punished for any offense, not capital, except as provided in section 584 of this title, unless the indictment is found, or the information is instituted, within three years next after such offense shall have been committed: *Provided, however,* That in offenses involving the defrauding or attempts to defraud the United States or any agency thereof, whether by conspiracy or not, and in any manner, and now indictable under any existing statutes, the period of limitation shall be six years. This section shall apply to acts, offenses, or

transactions where the existing statute of limitations had not yet fully run on November 17, 1921; but the proviso shall not apply to acts, offenses or transactions which on that date were already barred by the provisions of existing laws."

Section 695, Title 18, of the U. S. C.

"Sec. 695. Execution of sentences in State jail or penitentiary. Where any person convicted of any offense against the United States is sentenced to imprisonment for a period longer than one year, or to imprisonment and confinement at hard labor, the court by which the sentence is passed may order the same to be executed in any state jail or penitentiary within the district or State, * * *"

Section 753f of T. 18 of U. S. C.

"Section 753f. Persons convicted of Federal offenses; place of confinement; transfers. All persons convicted of an offense against the United States shall be committed, for such terms of imprisonment and to such types of institutions as the court may direct, to the custody of the Attorney General of the United States or his authorized representative, who shall designate the places of confinement where the sentences of all such persons shall be served. The Attorney General may designate any available, suitable, and appropriate institutions, whether maintained by the Federal Government or otherwise, or whether within or without the judicial district in which convicted. The Attorney General is also authorized to order the transfer of any person held under authority of any United States statute from one institution to another if in his judgment it shall be for the wellbeing of the prisoner or relieve overcrowded or unhealthful conditions in the institution where such prisoner is confined or for other reasons. (May 14, 1930, c. 274, Sec. 7, 46 Stat. 326.)"

Section 831, Title 18, of the U. S. C.

"Sec. 831. Selection of site; persons to be confined in; sentence need not specify place of confinement. * * * It shall be sufficient for the courts to sentence said class of offenders to imprisonment in the penitentiary without specifying the particular penitentiary * * *."

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265863—40

In the Supreme Court of the United States

OCTOBER TERM, 1940

NOS. 410, 411

SIDNEY J. DILLON AND LEWIS E. CROWLEY,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Circuit Court of Appeals for the Eighth Circuit (R. 313–320) is reported in 113 F. (2d) 334.

JURISDICTION

The judgments of the Circuit Court of Appeals were entered July 16, 1940 (R. 320–321). A petition for rehearing (R. 325–340) was denied August 5, 1940 (R. 341). The petition for writs of certiorari was filed September 9, 1940. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of

February 13, 1925. See also Rule XI of the Criminal Appeals Rules of this Court, promulgated March 7, 1934.

QUESTIONS PRESENTED

The petition for a writ of certiorari presents 16 questions and numerous variations of those questions. In our view, however, the only real questions presented are:

1. Whether the sentences imposed on petitioners were void.

2. Whether the counts of the indictment to which petitioners entered pleas of *nolo contendere* sufficiently charged offenses.

STATUTES INVOLVED

The pertinent statutory provisions are printed in the Appendix to the petition at pp. 90–91.

STATEMENT

On April 13, 1939, an indictment in twelve counts was returned against the petitioners in the District Court of the United States for the Southern District of Iowa (R. 1–18). The first count (R. 2–6) charged the petitioners with using the mails in furtherance of a scheme to defraud, in violation of Section 215 of the Criminal Code (U. S. C., Title 18, Sec. 338), and the twelfth count (R. 12–18) charged them with violating the fraud provisions of the Securities Act of 1933 (U. S. C., Title 15, Sec. 77 (q)).

On July 3, 1939, petitioners entered pleas of not guilty to all counts of the indictment (R. 21). Pe-

titioner Dillon, on September 15, 1939, and petitioner Crowley, on September 29, 1939, withdrew their pleas of not guilty to counts one and twelve and entered pleas of *nolo contendere* to those counts (R. 21, 22). On the latter date the District Judge ordered that the cause as to each petitioner be passed for sentence until November 27, 1939 (R. 22). On the day set for sentencing, petitioners filed a motion for "Discharge and to Dismiss and Quash Indictment" (R. 23–25) and an amendment thereto (R. 25–26). The motion, with its amendment, was on that day overruled (R. 26–27) and the petitioners were orally sentenced (R. 241). On the same day the District Judge signed and there were filed in the District Court judgments sentencing the petitioners as follows: Dillon, a fine of $1,000 on count one and imprisonment for five years on counts one and twelve, the terms of imprisonment to run concurrently; Crowley, a fine of $1,000 on count one and imprisonment for three years on counts one and twelve, the terms of imprisonment to run concurrently (R. 164–167).[1]

[1] It was asserted, in effect, in affidavits executed by the petitioners and their counsel, which were filed in the Circuit Court of Appeals (R. 303–311), that these judgments were signed and filed after the conclusion of the term at which the oral sentences were pronounced and that the petitioners and their counsel were not present when the judgments were signed. As indicated, however, the record discloses that the judgments were signed and filed on the same day that the oral sentences were pronounced, November 27, 1939, and the judgments indicate on their

The Circuit Court of Appeals for the Eighth Circuit unanimously affirmed the judgments of conviction (R. 313–321).

ARGUMENT

In a petition of 79 pages[2] the petitioners have advanced numerous contentions which are patently frivolous. With the exception of one, all of the contentions of the petitioners which merit any consideration have been sufficiently answered in the opinion of the Circuit Court of Appeals.

With reference to the petitioners' contention that the signed judgments departed from the oral sentence in providing that the petitioners should be imprisoned until the fines imposed upon them were paid,[3] there is nothing in the record to indicate that this alleged variance was called to the attention of the District Court.[4] Petitioners are

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face that the petitioners and their counsel were present at the time the sentences therein specified were announced. The affidavits are obviously not a part of the record proper and no reference is made to them in the opinion of the Circuit Court of Appeals. The verity of the record cannot, we submit, be contradicted by affidavits which are extraneous to the record. *Johnson* v. *United States*, 225 U. S. 405, 411.

[2] Cf. paragraph 2 of Rule 38 of this Court.

[3] It should be noted that this contention, although urged in an assignment of error in the Circuit Court of Appeals (R. 274), was not discussed in the opinion of that court.

[4] While the judgments contained a statement that "Defendant excepts" (R. 165, 167), this was, of course, insufficient to call the court's attention to the point which petitioners now make.

not, however, remediless if the judgments are inaccurate. Their remedy is to seek by motion in the District Court to correct the judgments so as to make them speak the truth (*Hill* v. *Wampler,* 298 U. S. 460, 464). The passing of the term at which the judgments were rendered does not preclude the entertaining of such a motion (*Foster* v. *Zerbst,* 92 F. (2d) 950, 952 (C. C. A. 10th) and cases there cited).

CONCLUSION

The case was correctly decided by the Circuit Court of Appeals, there exists no conflict of decisions, and there is presented no important question of Federal law. We therefore respectfully submit that the petition for writs of certiorari should be denied.

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